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No.

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

OF THE

United States

PRESTO CASTING COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

**PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

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QUESTIONS PRESENTED

1. Whether the National Labor Relations Board may order Presto Casting Company to execute and enter into a collective bargaining contract that Presto has not voluntarily agreed to, where the Board found a valid impasse existed between the collective bargaining parties.

2. Whether the National Labor Relations Board may modify the terms of an offer made by an employer, making that offer available for later acceptance, notwithstanding prior rejection of that offer, the submission of counter-proposals and a union-led strike.

3. May a three-judge panel overrule prior decisions of the same Circuit.¹

¹Other than those designated in the caption, the only other interested party is United Steelworkers of America, AFL-CIO-CLC. Though a corporation, petitioner neither owns any subsidiaries nor is a subsidiary of any other corporation.

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PRESTO CASTING COMPANY,
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VS.

NATIONAL LABOR RELATIONS BOARD,
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**PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

The petitioner, Presto Casting Company, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals entered on September 7, 1983.

CITATION TO OPINION BELOW

The decision of the Court of Appeals is officially reported at 708 F.2d 495 and is printed in the Appendix hereto.

JURISDICTION

The opinion of the Court of Appeals for the Ninth Circuit was issued on June 16, 1983, and judgment was subsequently entered on September 7, 1983. A timely petition for rehearing and suggestion for rehearing *en banc* was denied on August 2, 1983. The petition for certiorari was filed within sixty (60) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant parts of Sections 8(a)(5) and 8(d) of the National Labor Relations Act are set forth in the Appendix hereto. No constitutional provisions are implicated.

STATEMENT OF THE CASE

Presto Casting Company operates a metal casting plant in Phoenix, Arizona, and produces parts for the aerospace industry.² On November 12, 1980, United Steelworkers of America was certified as the collective bargaining agent for Presto Casting's production and maintenance employees.

Commencing on December 15, 1980, the parties began to negotiate for their first collective bargaining agreement. By February 10, 1981, after a two-day strike, the parties had reached substantial agreement on all non-economic issues. As found by the Ninth Circuit, these non-economic issues were "tentatively resolved, subject to an agreement on economic issues." (Appendix, p. 2.) As an additional element of the February 10 strike settlement, the parties agreed that they would meet again on February 17 and that if they were unable to reach an overall agreement on that date, "all bets were off." Moreover, it was agreed that there would be retroactive application of negotiated wage increases *only* if the parties would reach agreement

²Except where noted, the statement of facts is as set forth in the decision of the Court of Appeals.

on economics by February 18.³ (ALJD, p. 5, 11. 2-11; Tr. pp. 673, 676; GCX 8.)

When the parties met on February 17, they exchanged a series of proposals and counterproposals covering a wide range of economic topics. Shortly after midnight, the company made its "final final" offer. The Union rejected this offer and made a further counterproposal. Notwithstanding the existence of an impasse, the parties agreed to meet again on February 26.

On February 26, the Union submitted another proposal on economic items, which proposal was rejected by the company. The parties were not negotiating face-to-face, but were using the services of a federal mediator, who was relaying proposals and messages. The company advised the federal mediator that it was withdrawing its prior offer of increased fringe benefits and wage retroactivity, and that while it intended to implement its wage proposals, it would not implement any portion of the fringe benefit package or other non-economic items upon which tentative agreement had been previously reached. (ALJD p. 9, 11. 1-3; Tr. pp. 744-745.) Later that day, Presto unilaterally implemented only that portion of its final offer relating to wages. No retroactive wage payments were made.

On the evening of February 26, the Union conducted a strike vote and the employees, as had the Union, rejected the company's February 17 proposal. The following day

³The Court of Appeals incorrectly states that this agreement was reached at the beginning of bargaining. 708 F.2d at 498. It is undisputed that this statement was made at the conclusion of the February 10 negotiating session. (Tr., p. 679; Brief for the NLRB, p. 21.)

the Union again struck. Two weeks later, the Union ended its strike action and informed the company that it intended to accept the company's February 17 final offer. Presto responded that in light of the Union's previous rejections, its counterproposals, and the strike action, the company's last offer was no longer outstanding and could not be accepted by the Union. Presto agreed to commence bargaining anew, but the Union pressed its NLRB claims.

Both the NLRB and the Ninth Circuit found that the parties had failed to reach a freely negotiated agreement on February 17 and further, that a valid impasse was reached on February 26. Nevertheless the NLRB ordered the company to execute a written agreement incorporating its previously-tendered February 17 offer, thereby modifying the terms of that offer, for the purpose of compelling agreement where none existed.

REASONS FOR GRANTING THE WRIT

The Board's decision and the Ninth Circuit's affirmance jettison the centuries-old common law rule that a contract offer is revoked upon rejection or the making of a counter-offer. 1 *Williston on Contracts*, § 50A. There can be no dispute that the general rules of offer and acceptance have been adopted by labor and management alike, and have been followed since the inception of collective bargaining in the United States. In its place, the Board substitutes the rule that an offer "may be accepted within a reasonable time unless (i) it was expressly withdrawn; (ii) it was made expressly contingent on a condition subsequent; or (iii) circumstances intervening between offer and purported acceptance would characterize the latter as simply

unfair." (Appendix, p. 5.) As will be shown below, this hypertechnical rule has both the direct and indirect effect of allowing the Board to govern the substance of offers tendered in the collective bargaining arena, thereby imposing its will upon the substance of bargaining agreements.

Since the inception of the National Labor Relations Act (NLRA), employers have been required to bargain in good faith with unions. In 1947, the Taft-Hartley Act amended the NLRA to obligate both unions and management to bargain in good faith. Section 8(d) was added for the purpose of explicitly defining the duty to bargain as the obligation to meet at reasonable times and confer in good faith on terms and conditions of employment. The legislative history plainly shows that Congress was deeply concerned with prior decisions of the Board, which in effect required an employer to make or offer concessions before the Board would find that the employer was bargaining in good faith. Accordingly, it was expressly provided that the obligation to bargain, as required by Section 8(a)(5), did not include an obligation to agree to any particular proposal or the making of concessions. H.R. Rep. No. 245, 80th Cong. 1st Ses. 19-20 (1947). H.R. Rep. No. 510, 80th Cong. 1st Ses. (1947). *See also H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

In construing the necessary interrelationship between Sections 8(a)(5) and 8(d) of the NLRA, this Court has repeatedly held that the Act does not compel that agreements be reached between employers and unions. To the contrary, each side retains its inherent freedom of contract and the right to determine for itself the terms and condi-

tions of an agreement, if any, that can be reached. *Carbon Fuel Co. v. Mineworkers*, 444 U.S. 219 (1979); *Ford Motor Co. v. NLRB*, 441 U.S. 499 (1979); *NLRB v. Burns Intl. Security Services*, 406 U.S. 272 (1972); *H. K. Porter v. NLRB*, *supra*. In that regard, the Court has held that an overriding policy of Section 8(d) was to foster free collective bargaining without governmental regulation or compulsion to agree to any particular proposal. *Carbon Fuel Co. v. Mineworkers*, *supra*.

Consistent with that analysis, this Court has expressly held that the Board's remedial powers are limited by the same considerations that led to the enactment of Section 8(d). *H. K. Porter Co. v. NLRB*, *supra*. Where the Board may not rely upon the simple act of failing to agree to find a violation of Section 8(a)(5), likewise it may not compel agreement in that same dispute.

This overriding congressional intent has been reaffirmed by the Court in several significant decisions. First, in *NLRB v. American Ins. Co.*, 343 U.S. 395 (1952), the Board contended that it was a *per se* violation of the Act for an employer to seek a broadly-based management rights clause for the reason that such a clause would allow an employer to set various terms and conditions of employment. The Board argued to the Court that employers must agree to include in a contract provisions establishing fixed standards for various conditions of employment. In rejecting this argument the Court observed that Section 8(d) does not allow the Board to pass upon the desirability of substantive terms contained in collective bargaining agreements. Further, the Act does not require any party to engage in "fruitless marathon dis-

cussions," where agreement cannot be reached. Moreover, the Board may not, either directly or indirectly, compel concessions so as to interfere with the parties' inherent freedom of contract and the right to make their own agreements. 343 U.S. at 404. Likewise, in *NLRB v. Insurance Agents*, 361 U.S. 477, 487 (1960), the Court held that Congress through its enactment of Section 8(d) sought to prevent the Board from controlling the terms of collective bargaining agreements. Thirdly, in *NLRB v. Burns Intl. Security Services, supra*, the Board argued that a successor employer was obligated to follow a collective bargaining agreement executed by a predecessor. This contention was again rejected by the Court as it observed that such a position violated the very premise of the Act which is bargaining freedom, and freedom from having contract provisions imposed against either party's will. Although it is well-established that the Board is entitled to construe the Act, deference is not warranted where the Board fails to follow the underlying purpose of the statute or attempts to enter into new areas of regulation which Congress expressly precluded it from doing. *Ford Motor Co. v. NLRB, supra*.

Pursuant to the policy of freedom of contract and the requirement of mutual assent, the Board has long followed the common law rules of offer and acceptance to determine whether a "meeting of the minds" has been reached. *T. M. Cobb Co.*, 224 NLRB 694 (1976); *Lane Construction Corp.*, 222 NLRB No. 194, 91 LRRM 1337 (1976); *Lucas County Farm Bureau*, 218 NLRB 1155 (1976); *Loggins Meat Co.*, 206 NLRB 303 (1973); *Big John Food King*, 171 NLRB No. 197, 68 LRRM 1273 (1968). Absent a showing of offer, acceptance, and *mutual assent*, the NLRB is prohibited by

Section 8(d) from imposing a contract on the bargaining parties. *NLRB v. Sumner Home for the Aged*, 599 F.2d 762 (6th Cir. 1979); *NLRB v. Bus Co., Inc.*, 578 F.2d 472 (3rd Cir. 1978); *NLRB v. H. Koch & Sons*, 578 F.2d 1287 (9th Cir. 1978); *NLRB v. Downs-Clark, Inc.*, 479 F.2d 546 (5th Cir. 1973); and *Genesco, Inc. v. Joint Council 13*, 341 F.2d 482 (2nd Cir. 1965); but see *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d 87 (8th Cir. 1981).

The Board's instant abrogation of the common law of offer and acceptance is in direct conflict with the Seventh Circuit's decision in *Means & Co. v. NLRB*, 377 F.2d 683 (7th Cir. 1967) and previous decisions of the Ninth Circuit. *United Steelworkers of America v. Bell Foundry Co.*, 626 F.2d 139 (9th Cir. 1980), and *Lozano Enterprises v. NLRB*, 327 F.2d 814 (9th Cir. 1964). While hypertechnical rules of contract law do not govern collective bargaining agreements, it has been well-established that the normal rules of offer and acceptance are determinative of the existence of a bargaining agreement. *Means & Co. v. NLRB*, *supra*; and *Lozano Enterprises v. NLRB*, *supra*. Less than four years ago, the Ninth Circuit in *United Steelworkers of America v. Bell Foundry Co.*, *supra*, in the context of a Section 301 action, expressly held that modification of an offer operates as a revocation of that offer. A similar holding may be found in *Teamsters Local 524 v. Billington*, 402 F.2d 510, n. 2 (9th Cir. 1968), in which that court held that normal rules of offer and acceptance govern collective bargaining.

In the instant case, the Board asserts that it has merely redefined the rules of offer and acceptance by imposing its regulation that unless an offer is expressly withdrawn, it remains open-ended even though it has been previously

rejected. The rationale for this new "rule" is that there is a difference between the collective bargaining arena and the negotiation of commercial contracts and further, that collective bargaining parties are compelled to deal with each other. Remarkably, the Board seems to forget that the fundamental basis for the enactment of the NLRA was Congress' desire to provide for labor peace so as not to obstruct *commerce* and the free flow of *commerce*. Additionally in *Inland Steel Co.*, 9 NLRB 783 (1938), and *St. Joseph Stockyards*, 2 NLRB 39 (1936), the Board found that it was an unfair labor practice for employers to refuse to sign an agreement embodying the terms negotiated, even though such a requirement was not then contained in the Act. The basis for these decisions was that it was customary in commercial settings to have a written agreement which outlined the duties and responsibilities of the contracting parties, and the unions' request for written agreements was consistent with what any "prudent businessman would expect." Indeed, this argument lies at the heart of the Court's decision in *H. J. Heinz Co. v. NLRB*, 311 U.S. 514 (1941), where the Court observed that a businessman who refused to put his commitments in writing could not expect to be found to have bargained in good faith by that refusal and accordingly, the ~~same~~ rationale should be applied to an employer, who by his refusal to sign apparently would not honor his verbal commitments. Given this history, the Board may not properly contend that there is a meaningful distinction, for purposes of offer and acceptance, between commercial contracts and collective bargaining agreements. Moreover, the general principles of offer and acceptance were uniformly followed at the time of the enactment of the NLRA and

Taft-Hartley, and were thereby a part of the concept of collective bargaining with which Congress dealt.

There is no dispute, and it was reaffirmed by the Ninth Circuit, that the parties reached a bona fide impasse on February 26, and could not conclude a voluntary agreement. There was nothing in the written "final final" offer which extended it on into infinity or granted the Union an opportunity, at its whim, to test the strike waters and then return to the bargaining table unscathed. Thus, simply because the parties must deal with each other, this does not mean that the Board has the authority to break the logjam by redefining the terms of an offer submitted by Presto, to suit its purposes of compelling an agreement. Significantly, the Ninth Circuit affirmed that the parties reached agreement on a ground rule that "'all bets were off' if the negotiations broke down." (Appendix, p. 5.) In redefining the "parties' expectations" vis-a-vis these plain words, the Board has rewritten Presto's final offer to include a term that would make it available for union acceptance within a reasonable period of time. As a result, the Board is now attempting to fashion a rule that all offers are available for later acceptance, notwithstanding rejection and the submission of counterproposals thereto, unless the offer has been expressly withdrawn in a form and fashion acceptable to the Board. Such a rule does *not* involve the mere establishment of procedures to be followed by the parties, nor is the Board simply observing the process of collective bargaining. Rather, the Board seeks to participate in the substance of collective bargaining by dictating the terms of an offer, i.e., the length of time within which that offer may be accepted, irrespective

of prior rejections or the submission of counterproposals. This meddling in the substantive aspects of collective bargaining, which of necessity compels a concession by an employer to a union whereby its offer is extended indefinitely absent express withdrawal on terms acceptable to the Board, is contrary to the policy of the Act in general and is in direct conflict with the remedial limitations placed upon the Board by Section 8(d). Once a union has rejected an employer's offer, the Board has no authority to require that the employer expressly withdraw its offer or run the risk of having a union accept that offer at a later time. If a valid impasse has been reached, it is the collective bargaining parties who must determine the conditions under which they will continue bargaining, and not the Board. The Board's instant policy of requiring the express withdrawal of offers or suffer the consequences of an open-ended offer is no different than requiring that specified terms and conditions of employment must be addressed and incorporated into an agreement. Cf. *NLRB v. American Ins. Co.*, *supra*.

The Ninth Circuit's decision not only improperly abolishes the need for mutual assent, but also conflicts with its own developed case law. This intra-circuit conflict goes unexplained, as the Court's decision fails to cite or discuss either *Bell Foundry* or *Billington*, despite the Circuit's acknowledged position that the doctrine of *stare decisis* prevents the Court from overruling a previous panel decision. *Royal Development Co. v. NLRB*, 703 F.2d 363 (9th Cir. 1983).

From a practical standpoint, the Board's decision is inherently contradictory and has the effect of placing em-

ployers in an untenable position. Thus, while the Board asserts that it permits an employer to withdraw an offer prior to acceptance, it has also promulgated a nearly *per se* rule that such withdrawals, without good cause, are violative of Section 8(a)(5) of the Act. E.g. *Randle-Eastern Ambulance Service, Inc.*, 230 NLRB 542 (1977), *enf. den. in relevant part* 584 F.2d 720 (5th Cir. 1978). In the absence of an acceptable explanation, the Board uniformly refuses to permit an employer to retract an outstanding offer. Compare *Pittsburgh-Des Moines Steel Co.*, 235 NLRB 666 (1980), *enf. den.* 663 F.2d 956 (9th Cir. 1981), with *Times-Herald*, 249 NLRB 13 (1980). Similarly, various Courts of Appeal have also found a violation of Section 8(a)(5) where an offer was withdrawn prior to imminent acceptance. *Mead Corp. v. NLRB*, 697 F.2d 1013 (11th Cir. 1983); and *NLRB v. Ramona's Mexican Food Products Inc.*, 531 F.2d 390 (9th Cir. 1975). See also *NLRB v. Pacific Grinding Wheel Co.*, 572 F.2d 1343 (9th Cir. 1978). Stated otherwise, the Board asserts that it may adopt a procedural rule requiring the withdrawal of offers. However, that procedural rule becomes one of substance for the reason that the simple act of following the Board's procedure subjects the employer to independent liability under Section 8(a)(5) for having withdrawn an offer. What the Board gives with one hand, it takes back with the other. It is readily apparent that the Board's rewriting of Section 8(d), to serve its own purposes and to force agreements where none can be had, will result in brinksmanship rather than industrial peace.

Employers and unions are entitled to rules which will lend certainty to the negotiating process and ensure that a

meeting of the minds has occurred. This was correctly observed by the Seventh Circuit in *Means & Co. v. NLRB*, *supra*, where it held that industrial peace can best be served by following rules which are calculated to afford some degree of certainty in collective bargaining. The Court refused to accept the Board's deviation from general principles of contract law and its failure to justify such an attempt.

The common law rules governing offer and acceptance require nothing more than the simple acts of offering, accepting, or rejecting proposals. They do not require tendering offers in a certain form, conditioning those offers upon various events, or dictating the length of time those offers are available for acceptance notwithstanding prior rejection. By imposing a requirement that offers be expressly withdrawn or limited to a specified duration, the Board has compelled the making of a concession, and has injected itself into the formulation of offers. Such offers form the basis of the terms and conditions ultimately to be agreed upon by the parties through mutual assent. Accordingly, the Board has entered the bargaining process in a direct and meaningful fashion which will necessarily have an impact upon substantive agreements reached by collective bargaining parties. The Board may not use this indirect or veiled approach to accomplish that which it may not do directly.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Dated: September 29, 1983.

Respectfully submitted,

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(Appendices follow)

Appendix A

United States Court of Appeals,
Ninth Circuit

No. 82-7386

Presto Casting Company,
Petitioner,

v.

National Labor Relations Board,
Respondent.

On Petition to Review a Decision of the
National Labor Relations Board

Before HUG and FARRIS, Circuit Judges, and
GADBOIS,* District Judge

GADBOIS, District Judge:

This matter is before the court on the petition of Presto Casting Company to review and set aside an order of the National Labor Relations Board, and the cross-application of the Board for enforcement of the order. Both petitions were timely filed and jurisdiction is afforded by 29 U.S.C. § 160(e) and (f).

Presto is a metal casting firm which operates a foundry and heat treating plant in Phoenix, Arizona. On November 12, 1980, the Board certified the United Steelworkers of America as the collective bargaining representative of Presto's production and maintenance employees. Commencing on December 15, 1980 and through February 26,

*The Honorable Richard A. Gadbois, Jr., United States District Judge, Central District of California, sitting by designation.

1981, the parties met a number of times for the purpose of negotiating a collective bargaining agreement. At Presto's insistence, the parties treated non-economic and economic matters separately. Initial negotiations were limited to non-economic items. Negotiations broke down when a personality problem developed between Garza, negotiator for the company, and Smith, the union spokesman. On February 10, 1981, the union met with Presto's new negotiator, Long. The latter had prepared a draft of the company's non-economic proposal and presented it to the union. After some revisions the non-economic issues were tentatively resolved, subject to an agreement on economic issues.

On February 17, Long presented the company's economic package to Smith. During the course of a marathon bargaining session, the parties exchanged proposals and counter-proposals covering a wide range of economic issues. Late in the meeting Long submitted his "final final" offer. The union made a counter-proposal which Long rejected. The union again proffered a counter-proposal, but Long reiterated that Presto had made its ultimate offer. The parties agreed to meet again on February 26. At that meeting the union gave Presto another proposal on economic matters, but again Long rejected it. That evening the union conducted a strike vote. The employees rejected the Presto proposal. A strike commenced on February 27 and lasted until March 6. Smith decided to terminate the strike on March 6 because a majority of the employees had in fact returned to work. A union mailgram accepting the company's final offer was sent on the afternoon of March 6. Garza, who had earlier heard of the union's acceptance,

informed Long that the union was accepting the company's offer. Long notified the federal mediator that he wanted the proposal withdrawn from the bargaining table. The union mailgram was received at Presto on March 7. Acting on the union's March 6 acceptance of the agreement, those employees who had remained on strike reported to the company's main plant on March 9, unconditionally seeking reinstatement. Presto has refused to acknowledge existence of an agreement or to conform to any of its provisions.

At various relevant times the union filed with the Board unfair labor practice charges which complained of Presto's:

- (i) failing to acknowledge and sign the March 6 "agreement" with the union; (Sections 8(a)(1) and (5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1) and (5))

- (ii) failing to reinstate economic strikers who had not been permanently replaced; (Sections 8(a)(1) and (3) of the Act, 29 U.S.C. § 158(a)(1) and (3))

- (iii) unilateral discontinuance during negotiations of the company's past practice of holiday distributions; (Sections 8(a)(1) and (5) of the Act, 29 U.S.C. § 158(a)(1) and (5))

- (iv) requiring returning economic strikers to sign a company-prepared request for reinstatement.

The Administrative Law Judge found for the union on these charges. The Board affirmed the ALJ's findings of fact and conclusions of law and adopted his recommended order.

The principal issue in this case is whether the Board erred in finding that Presto's final contract offer was still susceptible of acceptance on March 6, notwithstanding that it was subjected to two counteroffers and a rejection, fol-

lowed by a strike. The law is clear that we must affirm a decision of the Board which relies on findings of fact supported by substantial evidence. *NLRB v. Tomco Communications, Inc.*, 567 F.2d 871, 876 (9th Cir.1978); and *Capitol-Husting Co., Inc. v. NLRB*, 671 F.2d 237, 242-243 (7th Cir. 1982).

Presto urges us to apply general legal principles of contract formation and to hold that counteroffers, rejections and a subsequent change of relative bargaining positions in favor of the offeror constitute withdrawal of the offer and that a purported acceptance thereafter is wholly ineffective. Indeed, this court, in *Lozano Enterprises v. NLRB*, 327 F.2d 814, 819 (9th Cir.1964), stated:

We do not at all mean to hold that, in general, the normal rules of offer and acceptance are not determinative as to whether an agreement has been reached in a collective bargaining situation . . .

As *Lozano* observes, however, strict reliance on that generality is an overly simplistic approach.¹ The more considered view is that adopted in *Pepsi-Cola Bottling Co., Etc. v. NLRB*, 659 F.2d 87 (8th Cir.1981). There the court confronted a situation in which the employer refused to acknowledge an agreement based on its own proposal, which was initially rejected but accepted shortly thereafter. The court noted that technical rules of contract formation do not confine collective bargaining, because the parties are obliged by their relationship to deal exclusively with each other and because policies of the Act dictate that

¹Lozano holds that intentional failure to deliver a written contract signed by the parties is ineffective to bar its enforcement. 327 F.2d at 819.

this process not be encumbered by undue formalities. *Id.* at 89. *Pepsi-Cola* held that an offer is not automatically terminated by rejection or counter-proposal. Rather, it may be accepted within a reasonable time unless (i) it was expressly withdrawn; (ii) it was made expressly contingent on a condition subsequent; or (iii) circumstances intervening between offer and purported acceptance would characterize the latter as simply unfair. *Id.* at 89-90. We now adopt that holding as the law of this Circuit.²

Applying the above rule to the facts in this case, we find that substantial evidence supports the Board's conclusion that Presto's offer was not withdrawn. The company makes much of the ground rules set at the beginning of the bargaining between Long and Smith, at which time it was agreed that "all bets were off" if the negotiations broke down. It certainly could be implied that any company offer on the table when negotiations terminated was automatically revoked. The Board determined otherwise, however, and it has the expertise to determine the reasonable expectations of the parties during the period in issue. The "all bets are off" statement was made early in the bargaining process and was not used in connection with the impasse reached on February 26. Further, there is some evidence that Presto itself thought that the offer was still open. When Long heard on March 6 that the union had sent a mailgram of acceptance, he tried expressly to withdraw the offer.

²This rule is fully consistent with decisions of this court dealing with contract formation in the context of labor relations. See *Lozano Enterprises v. NLRB*, 327 F.2d at 818-19; *NLRB v. Electro-Food Machinery, Inc.*, 621 F.2d 958, 958 (9th Cir.1980); and *NLRB v. Donkin's Inn, Inc.*, 532 F.2d 138, 141-42 (9th Cir.1976), cert. den., 429 U.S. 895, 97 S.Ct. 257, 50 L.Ed.2d 179.

Presto complains that the Board's order is unfair, since it takes away the economic advantage earned by its having weathered the strike. The decision in *Pepsi-Cola Bottling Co., Etc. v. NLRB*, correctly states the rule that a mere change in bargaining strength does not create such unfairness as to negate acceptance. 659 F.2d at 90.

The Presto offer, which was not contingent on a subsequent condition, was never the subject of an effective express withdrawal. It was accepted within a reasonable time, and the intervening events do not render recognition of the agreement as unfair. Whether the agreement was in fact reached by the parties is a question for the Board to determine. *Capitol-Husting Co., Inc. v. NLRB*, 671 F.2d at 243. Since the Board's determination in this case is supported by substantial evidence we cannot declare the same to be erroneous, even if we might reach a different conclusion on the same evidence. *Id.*; accord, *NLRB v. Nevis Industries, Inc.*, 647 F.2d 905, 908 (9th Cir.1981).

The second issue raised by Presto's appeal concerns its alleged failure timely to reinstate several economic strikers. Presto complains of the Board's finding of such failure in that the issue was not raised in the complaint against it. It is clear that the Board may find an unfair labor practice even though not specifically charged in the complaint, if in fact the issue has been fairly and fully litigated. *Alexander Dawson, Inc. v. NLRB*, 586 F.2d 1300, 1304 (9th Cir.1978). Here, the complaint charged Presto with unfair labor practices connected with the strike itself. Presto was not prepared at the hearing to come forward with valid reasons for failure to reinstate economic strikers. Under these circumstances Presto did not have the opportunity to litigate

the issue fairly, and enforcement of the Board's order in this respect must be denied.

The remaining issues involve Board determinations that Presto violated the Act by requiring returning workers to sign a reinstatement form and unilaterally abolishing a minor employee benefit. We affirm these orders. On the first issue, there was substantial evidence to support the finding that reinstatement was conditioned upon signing the form. When the striking employees made an unconditional offer to return to their employment, Presto was obligated to make them an unconditional offer of reinstatement. *See Shelly & Anderson Furniture Mfg. Co., Inc. v. NLRB*, 497 F.2d 1200, 1204 (9th Cir.1974). With respect to the employee benefit situation, Presto concedes technical violation of the Act but argues that it was *de minimis* and later cured. The remedial authority of the Board, however, is broad and discretionary, and it is not an abuse of discretion to make an order to deter future misconduct despite a claim of compliance. *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 612 n. 32, 89 S.Ct. 1918, 1939 n. 32, 23 L.Ed.2d 547.

Enforcement of the Board's order is granted in part and denied in part.

Appendix B

United States Code, Title 29, Section 158(a)(5)

SEC. 8. (a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

United States Code, Title 29, Section 158(d)

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession: . . .

OCT 18 1983

No. 83-556

ALEXANDER L. STEVAS,

In the Supreme Court

OF THE

United States

PRESTO CASTING COMPANY,

Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

**SUPPLEMENTAL APPENDIX TO
PETITION FOR WRIT OF CERTIORARI TO
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

McLAUGHLIN & IRVIN

PATRICK W. JORDAN*

HENRY F. TELFEIAN

333 Market Street, #1050

San Francisco, CA 94105

Telephone: (415) 777-0115

Counsel for Petitioner

Presto Casting Company

**Counsel of Record*

Appendix C

United States Court of Appeals
For the Ninth Circuit

Nos. 82-7386/7465

Presto Casting Company,
Petitioner,

v.

National Labor Relations Board,
Respondent.

[Filed Aug. 2, 1983]

On Petition for Review and Cross-Application
For Enforcement of an Order of the
National Labor Relations Board

Before: HUG and FARRIS, Circuit Judges, and GAD-
BOIS*, District Judge

The panel, as constituted in the above case, voted to deny the petition for rehearing. Judges Hug and Farris voted to reject the suggestion for rehearing en banc, and Judge Gadbois recommended rejection of the suggestion for a rehearing en banc.

The full court was advised of the suggestion for an en banc hearing, and no judge in active service requested that a vote be taken. Fed. R. App. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

*Honorable Richard A. Gadbois, Jr., United States District Judge, Central District of California, sitting by designation.

Appendix D

262 NLRB No. 47

D-8937

Phoenix, AZ

United States of America

Before the National Labor Relations Board

Cases 28-CA-6237, 28-CA-6237-2, and 28-CA-6344

Presto Casting Company

and

United Steelworkers of America, AFL-CIO-CLC

DECISION AND ORDER

On February 10, 1982, Administrative Law Judge Russell L. Stevens issued the attached Decision in this proceeding. Thereafter, the General Counsel and the Respondent filed exceptions and a supporting brief. The Respondent also filed a brief in opposition to the General Counsel's exceptions.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,¹ and conclusions of

¹We agree with the Administrative Law Judge that the Respondent, *inter alia*, violated Sec. 8(a)(3) and (1) of the Act when it refused to reinstate economic strikers upon their unconditional offer to return to work. While not specifically alleged in the complaint, this matter was litigated at the hearing and, as noted by the Administrative Law Judge, the Respondent has failed to meet its burden of showing why the economic strikers could not be immediately reinstated.

the Administrative Law Judge and to adopt his recommended Order.²

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the Respondent, Presto Casting Company, Phoenix, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, except that the attached notice is substituted for that of the Administrative Law Judge.

Dated, Washington, D.C., June 21, 1982

John H. Fanning, Member

Howard Jenkins, Jr., Member

Don A. Zimmerman, Member

National Labor Relations Board

(SEAL)

²In accordance with his dissent in *Olympic Medical Corporation*, 250 NLRB 146 (1980), Member Jenkins would award interest on the backpay due based on the formula set forth therein.

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a hearing at which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and we have been ordered to post this notice.

WE WILL NOT violate Section 8(a)(5) and (1) of the Act by discontinuing our past practice of giving employees annual Christmas gifts of turkeys, without first notifying or bargaining with the Union; by failing and refusing to acknowledge and sign a 1-year agreement with the Union, reached on March 6, 1981; and by refusing to honor and implement the provisions of said contract of March 6, 1981, relating to dues checkoffs and employee grievances.

WE WILL NOT violate Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate economic strikers who were not permanently replaced during their strike, upon their unconditional offer to return to work; and by requiring that said economic strikers sign a company-prepared request for reinstatement as a condition of reinstatement.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed in Section 7 of the Act.

WE WILL forthwith sign and acknowledge the contract reached with the Union on March 6, 1981, and give said contract retroactive effect to said date of March 6, 1981.

WE WILL make whole all employees who suffered any losses by reason of failure to sign said contract on March 6, 1981, and by reason of our failing and refusing to reinstate economic strikers who were not permanently replaced during their strike, upon their unconditional offer to return to work, with interest.

Presto Casting Company
(Employer)

Dated By
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 3030 North Central Avenue, Second Floor, Box 33069, Phoenix, Arizona 85012, Telephone 602-241-2362.

United States of America
Before the National Labor Relations Board
Division of Judges
Branch Office
San Francisco, California
Case 28-CA-6237, 20-CA-6237-2, 28-CA-6344
Presto Casting Company

and

United Steelworks of America, AFL-CIO-CLC
Denise M. Blommel and Kenneth Meadows,
of Phoenix, Ariz., for the General Counsel.
Patrick W. Jordan, of San Francisco, Calif.,
for the Respondent.

James Smith, of Phoenix, Ariz., for the Charging Party.

DECISION

Statement of the Case

RUSSELL L. STEVENS, Administrative Law Judge:
This case was tried in Phoenix, Arizona, on September 9, 10, 11 and October 21 and 22, 1981.¹ The charge in Case No. 28-CA-6237 was filed on January 9 by United Steelworkers of America, AFL-CIO-CLC (Union), and an amended charge was filed by the Union on February 10. The complaint, issued February 18, alleges that Presto Casting Company (Respondent) violated Section 8(a)(1) and (5) of the National Labor Relations Act (Act). The charge in Case No. 28-CA-6237-2 was filed by the Union on February 5, an amended charge was filed by the Union on February 10, and a second amended charge was filed by the Union on February 27. The complaint, issued March 24,

¹All dates hereinafter are within 1981, unless stated otherwise.

alleges that Respondent violated Section 8(a)(1) and (5) of the Act. The charge in Case No. 28-CA-6344 was filed by the Union on March 11. The complaint, issued April 14, alleges that Respondent violated Section 8(a)(1), (3) and (5) of the Act. By Order dated April 14, the Regional Director of Region 28, National Labor Relations Board (Board) consolidated said three cases for trial. The trial of all three cases was heard as aforesaid.

All parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, to argue orally and to file briefs. Briefs, which have been carefully considered, were filed on behalf of General Counsel and Respondent.

Upon the entire record,² and from my observation of the witnesses and their demeanor, I make the following:

Findings of Fact

I. Jurisdiction³

Respondent is, and at all times material herein has been, a corporation duly organized under, and existing by virtue of, the laws of the State of Arizona, with an office and place of business at 5440 West Missouri Avenue, Glendale, Arizona, and a heat treatment plant located at 59th Avenue and West Van Buren Street in Phoenix, Arizona, where it is engaged in the production of rough metal castings.

During the past 12-month period, which period is representative of its operations generally, Respondent, in the course and conduct of its operations, purchased goods and

²General Counsel's motion to correct transcript, filed with the brief, is not opposed of record and is granted.

³Jurisdictional facts are admitted by Respondent in its pleadings.

materials valued in excess of \$50,000 which were transported in interstate commerce and delivered to the Respondent's places of business in the State of Arizona, directly from suppliers located in states of the United States other than the State of Arizona.

I find that Respondent is, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

II. The Labor Organization Involved

United Steelworkers of America, AFL-CIO-CLC is, and at all times material herein has been, a labor organization within the meaning of Section 2(5).

III. The Alleged Unfair Labor Practices

Background⁴

Respondent is a metal casting firm, which casts aluminum and magnesium parts for the aerospace industry. Respondent was organized in 1965 by two partners—Mel Borovay,⁵ who is president of the corporation, and James Herman, vice-president of operations.⁶ Respondent has two facilities, located at separate locations in Phoenix. The principal facility is the foundry, located at 5440 Missouri, and the secondary facility is the heat treatment plant on 59th Street.

The Union conducted an organizational campaign among Respondent's employees at both of Respondent's facilities in the fall of 1980. During that campaign, Respondent uti-

⁴This background summary is based upon stipulations of counsel, and upon credited testimony and evidence that is not in dispute.

⁵Individuals are referred to herein by their last names.

⁶The supervisory status of Borovay and Herman is not in dispute.

lized the services of West Coast Industrial Relations Association (West Coast), whose board chairman is Fred Long. West Coast is a labor and industrial relations organization with many years experience, and Long, an attorney, has been engaged in the field of labor relations since 1960. The Union's campaign was successful, and on November 12, 1980 the Union was certified by the Board as the exclusive collective-bargaining representative of Respondent's employees in the following unit:

All production and maintenance employees employed by Respondent at its plant located at 5440 West Missouri Avenue, Glendale, Arizona, and its heat treatment plant located at 59th Avenue and Van Buren Street, Phoenix, Arizona; excluding all office clerical employees, guards, and supervisors as defined in the Act.⁷

After the campaign and certification, and at all relevant times thereafter, Respondent continued to utilize the services of West Coast in its dealings with the Union.

On November 21, 1980 James Smith, a long time staff representative of the Union and temporary subdistrict 8 director for the Union, wrote a letter to Herman, requested certain information for negotiation purposes,⁸ and suggested the dates of December 8, 9 and 10 for negotiations. On December 5, 1980 John Garza, a representative of West Coast, replied to Smith's letter to Herman and suggested alternative negotiation dates of December 17 and 31, and January 3, because of prior commitments on the dates proposed by Smith.

⁷As of November 16, 1980 the unit consisted of 161 employees.

⁸Smith acknowledged that Respondent furnished to the Union during negotiations, all information requested by the Union prior to negotiations.

The first negotiation session was held on December 15, 1980 and lasted approximately 30 minutes. In attendance for Respondent were Garza and one of Herman's sons. In attendance for the Union were Smith; Arnold Mendivil, an employee who was on the Union's negotiation committee; Danny Campbell, an employee who was on the Union's negotiation committee; and Harlin Cornett.

The next negotiation session was held for several hours on January 7. Some time prior to that meeting Smith had learned that Respondent had not given a Christmas turkey bonus in 1980 as it consistently had done each Christmas for many years, and at the meeting he inquired about the matter. The subject, which is discussed in detail *infra*, was not settled at the meeting and on January 9 the Union filed an unfair labor practice charge, mentioned above, alleging discontinuance by Respondent of the latter's past practice of giving turkeys, because of Respondent's employees having been organized by the Union. Respondent submitted some proposals, all of a non-economic nature, which were discussed at this meeting.

The Union prepared an economic proposal covering holidays, overtime, cost-of-living, life insurance, a medical and dental program, shift premiums, wages and coffee breaks,* and gave the proposal to Respondent at the negotiation session of January 14. However, the proposal was not discussed because Respondent first wanted to prepare its economic proposals. Noneconomic matters were discussed at this meeting of January 14, since the Union decided to so use the time while awaiting preparation by Respondent of its economic proposal.

*General Counsel's Exhibit No. 6.

The parties met again on January 21, 28, 29 and 30, and February 2, 3, 5 and 10 and discussed non-economic proposals.

On February 2 Smith sent a strongly-worded mailgram to Borovay, saying he felt Respondent's representative (Garza) was not bargaining in good faith, and that "a strike seems imminent."¹⁰

On February 5 Long received a telephone call from West Coast's Southern California representative, who advised that there appeared to be a personality clash between Smith and Garza, and that assistance was needed. Long decided to take over the negotiations, commencing with the meeting with the Union scheduled for February 10 at 10 a.m. Long went to Phoenix, and shortly after arrival talked with Garza, Herman and Borovay, during which conversation he learned that the Union had called a strike on February 9, the preceding day. Long also learned that a principal problem was a dues checkoff provision the Union wanted, and that another problem was the turkey bonus. Long advised Herman and Borovay that they were required to continue the turkey gift as in the past, and they agreed to do so. (This matter is discussed *infra*.) Long also talked with Herman and Borovay about the do's and don'ts of union negotiations.

¹⁰On February 4 Borovay wrote a letter to Smith, summarizing events to that date and stating, *inter alia*, "It has been our understanding that an agreement had been reached 'early on' between the parties re: an agenda of bargaining topics—*non-economic issues firstly and economic issues last.*" So far as the record shows, that statement by Borovay accurately reflected the agreement of the parties. Smith did not challenge Borovay's understanding.

A meeting was held between the Union and Respondent the following day, February 10, with the presence of Ron Collotta, a representative of the Federal Mediation and Conciliation Service (FMCS) replacing Sam Franklin, who to that time had been working with Respondent and the Union. Long talked separately with Collotta, and later, talked with Smith and Collotta together. At the meeting Smith told Long, who inquired about the reason for the strike, "We had to shut them down in an effort to get the non-economic issues resolved."¹¹ Long asked for some time to prepare a draft of noneconomic proposals, and he left the room to do so. When he later brought the proposals back into the meeting room, he and Smith discussed a few problem areas and then agreed to Respondent's proposals as they were changed in a few places. Although Smith and Long had come to an agreement, Smith demanded, and Long supplied to him, an agreement that, if the economic issues were resolved prior to February 18, Respondent would make wage rates retroactive to the date of the certification of the Union as representative of the unit employees. Because the noneconomic proposals all were agreed to by the parties, and because Smith received an

¹¹This strike is not in issue. The quotation is from Smith's testimony. There is no allegation of bad faith bargaining as of this time, and it is clear that the strike of February 9-10 was not an unfair labor practice strike. This conclusion is mandated by the sequence of events and by Smith's lengthy testimony on cross-examination, giving in some detail the negotiations, and agreement reached on non-economic matters prior to and on, February 10. Smith testified that the strike was caused by Garza's failure to appear for a meeting scheduled February 9, but it is clear that strike was in order to put the heat on Respondent for an early contract. It was a very short strike, and Long got negotiations back on the track soon after he arrived in Phoenix on February 10.

assurance of retroactivity if an economic agreement were reached, Smith called off the strike, and the employees returned to work on February 11.¹² At the close of the meeting, Smith and Long agreed to meet on February 17 to discuss economic proposals. Long assured Smith that every effort would be made by Respondent to resolve the economic issues on February 17.

On February 17 Respondent distributed turkeys to all unit employees who were present that day, and those employees who were not present received a certificate to get a turkey.¹³

Respondent caused to be prepared, a typed version of the non-economic proposals agreed to by Smith and Long on February 10. One minor correction subsequently was made, and Garza delivered the final, typed agreement to Smith sometime between February 10 and 17.¹⁴ The agreement had a cover sheet reading as follows:

February 10, 1981

The Company reserves the right to change, withdraw or present additional proposals other than the ones outlined here at any time during these negotiations.

John J. Garza¹⁵

¹²Long credibly testified that Smith asked for, and received, assurances that there would be no reprisals against employees who went out on strike February 9; and that Long asked for, and received assurances that the Board would withhold further action on the charge concerning turkey gifts until February 18. This testimony is given no weight in making findings and conclusions, but it has been considered in assessing the relationship of the parties.

¹³The matter of the turkeys continued after February 17 to be an issue, and ultimately, the parties agreed that distribution of year-end turkeys would be an established practice.

¹⁴General Counsel's Exhibit No. 9.

¹⁵Much testimony was devoted to the question of whether, as Smith contends, the agreement of February 10 was "full and complete," and final, or whether it was tentative, as contended by Long.

During the evening of February 10 Long met with Borovay and Herman. Long reviewed the agreement reached with Smith relative to non-economic matters, and they discussed at length and in detail, the economic issues that would be the basis for the meeting of February 17. It was agreed that a principal issue would be the merit system. The Union wanted flat rates for various categories and steps of employment, and Respondent wanted to continue its existing merit increase program. The document the three used as a basis for their later proposals is General Counsel's Exhibit 26. Long cautioned Borovay and Herman that, to reach an agreement, they would be required to compromise their positions on many matters, including wages and promotions. Herman and Borovay met with Long again on February 16 and showed Long what they would offer (indicated on G.C. 26), but the two would not relinquish their position on the merit increases which the Union opposed so vigorously.

Long, Borovay and Herman met with Smith on February 17, in a session that lasted several hours. Collatta was present, as needed. During the early part of the meeting, Respondent gave the Union a list of Respondent's job descrip-

Whatever may be the nature of the agreement itself, Long and Smith concur that they reached an agreement, which is General Counsel's Exhibit No. 9. It is apparent from the record, and it is found, that the agreement reached by Long and Smith was intended to be part of an overall contract, if such a contract could be reached, and that, without a total contract, G.C. 9 would not be a separately enforceable contract. Long's testimony, and Garza's cover sheet quoted above, which was not challenged by the Union, support the record on this point. There is no evidence, however, that the parties ever discussed the language on, or the cover sheet.

tions,¹⁶ and Respondent's "First Economic Proposal."¹⁷ The parties discussed the Union's economic proposals,¹⁸ and the Union gave Respondent a counterproposal covering wages, shift premiums, holidays, cost-of-living adjustments (COLA), insurance and pensions. The term of the agreement proposal was "open."¹⁹ Respondent then submitted its counteroffer, labelled "Company's Second Economic Proposal," at 5:00 p.m.²⁰ At approximately 5:25 p.m. the Union presented to Respondent its counterproposal to Respondent's counterproposal.²¹ Long then presented the following note to Smith:

JIM SMITH

Your 5:25 pm proposal does not appear too serious.

Suggest at this time you give us your bottom line proposal that you and your committee would recommend so we cut out the bullshit.

If we buy it we can go home. If not we'll know where we stand.

Fred A. Long

After much further discussion between Long and Smith, at which sometimes Herman, Borovay and Collotta were present, separately or together, Respondent submitted to the Union its Final/Final Offer,²² at approximately midnight. At approximately 12:30 a.m., the Union gave to Respondent

¹⁶General Counsel's Exhibit No. 3.

¹⁷General Counsel's Exhibit No. 12.

¹⁸General Counsel's Exhibit No. 6.

¹⁹General Counsel's Exhibit No. 13.

²⁰General Counsel's Exhibit No. 14.

²¹General Counsel's Exhibit No. 15.

²²General Counsel's Exhibit No. 18.

its further counteroffer. At approximately 1:00 a.m., Long replied to Smith:

*Company's Response to Union's
Counter Proposal to Company
Final/Final Offer*

The Company's Final/Final Offer was, in fact, final. Predicated on your last counter proposal to our final offer, noting wages the Union proposed in counter are higher than those proposed in Union's first wages proposal on 1-29-81. It seems safe to conclude we are at impasse in these negotiations. We are not prepared to move further than our final offer. It appears the Union is also not prepared to move further either. If that is the case we suspect you will advise the mediator your going home so we can go home.

Fred A. Long

The Union replied to Long:

The Unions last proposal was not as final as the companies, however it must be noted that the wages proposed were in direct relations to importance as proposed by the Company and in response to its freezing of employees rights to Automatic promotion with a Classification.

We are here to bargain a Contract and not to make two grown men that own the Company happy, we know they want to retain the same practices they had and if they want they can but they will certainly pay better wages for the privileges of continuing selective promotions.

Do what you may, we want a Contract and have spent a lot of time to get it and will spend much more if needed.

The Union

Long replied to the Union:

TO THE UNION (1:00 a.m.)

To repeat, the Company's final offer was final. We are sorry you aren't happy with it. However, there are no further concessions to be made. Sometimes it is difficult to change long standing practices even with union representation. There are no guarantees that union representation automatically means everyone gets what they want. That is the process of bargaining.

Since the Union apparently will not accept the Company's firm and final offer after due consideration; and since the Company will not change its offer; we are declaring an impasse in these negotiations.

Fred R. Long

Although the parties did not come to an agreement, they agreed, and Collotta concurred, that a further meeting should be held on February 26.

The parties met on February 26,²³ in Collotta's office. After a brief preliminary discussion, the Union gave Respondent an offer,²⁴ which Long rejected after talking on the telephone with Borovay and Herman. Long replied to the Union in writing:

The Company has reviewed the Union's offer of 2:10 p.m., Feb. 26, 1981 and discussed it by phone with Mel Borovay, President. The Company is of the opinion the Union is playing games based on its suggested offer and keeping the parties together when it has no intention of accepting the Company's final offer or anything close to it. The Company, therefore, rejects

²³At trial, Long and Smith both testified that the opposing party was not on time. That discrepancy is not resolved and is given no weight.

²⁴General Counsel's Exhibit No. 24.

the Union's proposal and repeats it has made its final best proposal to the Union. Unless the Union is prepared to accept the Company's final proposal or to re-arrange the economics of the Company's final proposal without adding additional economic cost, it unfortunately appears that despite agreement on all language matters, we are hopelessly deadlocked on economics.

Submitted 2:30 p.m. FMCS
FR Long
Company Spokesman

Long called Borovay and Herman on the telephone, said there was an impasse, and advised that Respondent could implement its last wage offer, effective immediately. Respondent implemented wage increases on February 26.

On February 26 the Union negotiating committee sent a letter to all of Respondent's employees:

TO ALL PRESTO EMPLOYEES:

Dear Fellow Worker:

Your Union has had numerous meetings with the expensive firm Jim and Mel. The Company has hired them to keep us working cheap so that they can live in luxury while most of us can hardly afford to eat.

Now we have got to make a very important choice:

Either work for what we've got, or strike to better ourselves!!!!!!

The choice is clearly ours. The Union will represent us. They will talk for us and advise us, but we, the workers, must make the choice. . . .

Some of us are Union Members, some are not. However, we are all low paid, badly treated play things of Jim and Mel's. We are all Presto Employees and must stick together as Presto Employees to ad-

vance ourselves to decent wages and working conditions.

Would it surprise you if the Company were paying the California firm over a hundred thousand dollars to keep from signing a decent contract?

Do you know how much of an increase we could have with a hundred thousand dollars? Just think—the *total raise, all together*, that was offered was \$45.00 per hour cost to the Company!

Well, as was said, the choice is ours. We must shoot Presto down tomorrow morning and we must all stay out until we get in our two big bosses' pocket books.

A strike vote will be held tonight at 5:00 p.m., at the I.W. Abel Hall, 23 North 35th Avenue, Phoenix, Arizona.

Please attend and exercise our unity to help shorten the strike!!

Smith held a meeting of Respondent's employees the evening of February 26, at which nine employees stated in writing that they had been offered raises effective the following Monday. The employees voted to strike, and a strike commenced February 27 at 6:00 a.m. Some picket signs (commencing the second day of the strike, since it was raining the first day) read "United Steelworkers of America on Strike," and others read "Presto Casting unfair, United Steelworkers of America on Strike."

The strike lasted until March 6, when it became apparent to Smith that many employees were returning to work, which was weakening the strike. The strike was called off at 2:45 p.m., March 6. Smith advised members of the negotiating committee that he was going to terminate the strike and accept Respondent's last offer. On March 6 Smith sent the following mailgram to Respondent:

THE UNITED STEEL WORKERS OF AMERICA ACCEPTS THE COMPANY'S FINAL OFFER MADE TO THE UNION ON FEBRUARY 17, 1981. THE EMPLOYEES SHALL BE RETURNING TO WORK STARTING MONDAY MORNING MARCH 9, 1981 AND ALL PICKETS WILL BE REMOVED. THE UNION SUGGESTS AN EARLY MEETING FOR THE PURPOSE OF SIGNING THE AGREEMENT. PLEASE HAVE FINAL COPIES MADE.

On March 9 Long wrote to Smith²⁵ and advised him that, since the Union previously had rejected Respondent's last offer, there could be no contract between the parties based upon Respondent's last offer. Long suggested further meetings with the Union, for further negotiations.

On March 11 Smith sent the following mailgram to Respondent:

THE UNION HEREBY UNCONDITIONALLY MAKES APPLICATION FOR REINSTATEMENT OF ALL BARGAINING UNIT EMPLOYEES. THESE EMPLOYEES REPORTED FOR WORK ON MARCH 9, 1981 AND WILL REPORT AGAIN ON MARCH 13, 1981.

By letter dated March 12, Smith replied to Long's letter of March 9 and stated the Union's position that the parties had a contract, based upon Respondent's last offer and the Union's acceptance thereof.

On March 16 Smith wrote a letter to Respondent, enclosed checkoff authorization cards of employees, and requested dues deductions for the employees ". . . as per contract," referring to provisions of the noneconomic agreement reached by Long and Smith on February 10.

²⁵General Counsel's Exhibit No. 34.

A. Case No. 28-CA-6237

Paragraphs 9 and 13 of this case allege, in substance, that, on or about December 24, 1980 Respondent discontinued its past practice of granting Christmas bonuses to employees without notice to, or bargaining with, the Union, in violation of Section 8(a)(1) and (5) of the Act.

The facts of a lengthy past practice (14 or 15 years) of giving employees Christmas turkeys; of not giving any to employees in 1980; and of giving them to unit employees in February upon advice of counsel, are not in dispute. Further, there is no question but what the failure of Respondent to give unit employees turkeys in 1980 was a result of the Union's organization of the employees. Finally, Respondent acknowledged that the fact of failure to give unit employees turkeys in 1980 was not bargained with the Union, which then was the employees' exclusive bargaining representative, and that the Union was not notified in advance of the failure.

Based upon the undisputed facts, it is apparent that, as of the end of 1980, Respondent was in violation of Section 8(a)(5) and (1) of the Act. The principal question on this issue is whether or not Respondent's correction in February of its violation in December, relieves Respondent of the initial violation.

Respondent acknowledges its "mistake," but argues in its brief that, since it made the mistake in good faith, later rectified its error, subsequently bargained about the subject, and included in its contract offer to the Union a provision relative to gifts of turkeys, its "technical" violation does not warrant a remedial order. In support of its argu-

ment Respondent cites *Bellinger Shipyards, Inc.*²⁶ That case is not the same as the case herein, and is not controlling, since a. there was no showing in *Bellinger* that any employee adversely was affected during the illegal rule's existence. Here, the employees adversely were affected at Christmas time, regardless of the fact that the illegality was "cured" in February. b. There was no showing in *Bellinger* that the Respondent there engaged in any unlawful act, other than promulgation of an illegal rule which it later rescinded. That is not the case herein, as discussed *infra*. c. In *Bellinger*, the Respondent voluntarily put itself in compliance with the Act. Here, Respondent put itself in compliance only after the Union filed a charge and objected that Respondent's actions were illegal. d. The violation in *Bellinger* was found by the Board to be minimal (8(a)(1)). Respondent's illegality in this case is found not to be minimal because of its effect upon the rights of the Union, as well as upon the rights of employees.

It is found that Respondent violated Section 8(a)(5) and (1) of the Act, as alleged.

B. *Case No. 28-CA-6237-2*

Paragraph 13 of the complaint alleges, in substance, that Respondent insisted during negotiations upon a wage proposal unacceptable to the Union, based upon a merit system; that Respondent implemented its proposal over objection of the Union; and that the implementation occurred in the absence of a grievance and good faith bargaining.

²⁶227 NLRB 620.

1. The wage proposals

Both sides made many proposals on many subjects during negotiations, and both sides demonstrated on many occasions their willingness to compromise their positions. As noted *supra*, there was substantial movement by both sides on noneconomic items, resulting in agreement and a document embodying those items. As discussed elsewhere herein, Respondent and the Union also compromised their initial positions on several economic items, after much hard bargaining. It is clear that, but for the matter of determining wages, as opposed to the amount thereof, the parties probably would have been able to agree. The one item that both sides insisted upon was that of their own systems of how to determine wage increases. Respondent wanted to keep the same sort of merit promotion system it had maintained since it began business, and the Union wanted the kind of system to which it is accustomed, i.e., flat rates with orderly progression of employees in a pre-determined manner. General Counsel argues that Respondent was insistent upon keeping its merit system in order to undermine the Union as the bargaining representative of Respondent's employees, but as discussed herein, the record does not support that argument. It is clear, as found *infra*, that Respondent was insistent upon keeping its system, albeit in a possibly modified form, for sound economic reasons.

General Counsel does not argue that a merit system *per se* is illegal, and in fact it is not illegal. Further, it cannot reasonably be argued that such a system is repugnant to the Union, because Case No. 28-CA-6237, discussed below, is grounded upon the contention that

Respondent now refuses to sign an agreement allegedly reached between the parties, which encompasses the merit system proposed by Respondent in its final/final offer. Therefore, the initial question relative to this issue involves Respondent's motive in standing pat during negotiations, on the matter of merit promotions.

Borovay was a credible witness, and his summary of Respondent's sensitivity concerning the Union's desire to eliminate Respondent's merit system is accepted as accurate and truthful. Borovay testified: Respondent is a job shop, which casts aluminum and magnesium aircraft parts for military and commercial customers. The parts are produced to customer specifications, usually in short runs, and are held to very close tolerances. The craft is a dying one, in that it no longer is taught in high schools or colleges. Acquisition of skillful craftsmen for the industry always is difficult, and it is particularly difficult in Arizona, which is not a highly industrialized area. The instances wherein Respondent is able to find skilled craftsmen for its employee complement are rare, yet safety requirements are such that quality control is rigid. Most employees must be obtained "off the street" and trained on the job, yet they must be held to the same accuracy standards as skilled craftsmen. The molds are in sand and are heavy, thus the work is hard as well as demanding. Because of the nature of the jobs, there are many quits and discharges—turnover is high. Capabilities of employees vary, as a result of which some become proficient in a short time whereas others never become proficient. In order to encourage and reward capable employees, and to prevent loading the payroll with low producers, the merit system of promotion has been in effect since the Company started in

business in 1965. Such a system is flexible and useful, since it assists in keeping a capable workforce and also provides a good basis for estimating prices. The business of Respondent is highly competitive, and protection against cost fluctuations and excesses is necessary because of the length of leadtimes between orders and production—8 months to 2 years. Respondent's business, as well as that of its competitors, began to drop late in 1980, and became evident in early 1981. It has steadily declined since that time. A year ago Respondent had two hundred and thirty employees, both hourly and salaried, and today has 70, of which 13 or 14 are salaried and the remainder hourly.²⁷ Borovay participated in conversations with Long in negotiations with the Union. Respondent was anxious to get a contract as soon as possible, and to avoid a strike, in order to be able to bid on an intelligent basis and to continue to compete in the depressed market. The Company presently is on a survival basis, and further layoffs are under consideration. The two separate plants currently are being consolidated into a single plant.

Herman testified much the same as Borovay, relative to the nature of the business, business conditions, and the merit system. Relative to the mechanics of the merit system, Herman credibly testified: A merit increase is a reward for excellence. The raises are based upon periodic evaluations by Herman, Borovay and the employee's supervisor. Until late 1978, the top rates of employees were appraised annually for possible wage increases and thereafter, because of rapid inflation, appraisals were made twice each year, in March and September. However,

²⁷This testimony was given on October 21. Counsel earlier stipulated that, as of September 4, Respondent had 111 unit employees, and as of March 6, Respondent had 188 unit employees.

there is no set system, and some employees at less than the top rate may receive three or four increases in a year. Since 1979, an employee who reaches top wage does not thereafter receive merit increases. Employees reach top pay only through merit increases. No merit increases have been given since June 1980, upon advice of counsel, pending agreement with the Union. Across-the-board increases never have been given to employees.

The Union's first wage proposal (G.C. 6) proposes a flat rate of pay for 11 types of employees, with no steps or variations among the types, or grades, of employees. The rates range from a low of \$4.80 per hour for new hire laborers, to \$7.20 per hour for inspectors.

Respondent's first wage proposal (G.C. 12) proposes 8 grades of employees, with steps "A", "B" and "C" within the grades to account for increased proficiency. The minimum is \$4.00 per hour for a laborer's starting rate; the maximum is \$7.00 per hour for inspectors. Leadmen and specialties were proposed at rates higher than other employees. Respondent proposed that raises above the wages listed be given "in its sole discretion based on merit and job performance," as had been done historically.

Respondent's counterproposal (G.C. 14) has the same starting wage rates Respondent previously proposed, but with a provision for automatic progression by years of service from classifications C to B, and B to A.

The Union's second wage counterproposal (G.C. 15) is the same as its original, and its first counterproposal.

On February 17 Collotta (FMCS) prepared suggestions (G.C. 17) which adopt, in pertinent part, Respondent's

theory of merit increases, providing that progression from C to B would be automatic after 12 months, and that progression from B to A would be on merit, based upon bid and seniority.

Respondent's final/final offer is much the same as its last counteroffer, with automatic raises after 90 days, and merit raises thereafter. The A, B and C classifications are retained.

The Union's counterproposal to Respondent's final/final offer shows a slight reduction in wage amounts, but retains the Union's basic insistence upon flat rates for all three classifications, A, B and C, with no allowance of merit increases.

Discussion

The above summary does not reflect the fact that, during negotiations, each side made several concessions and offers of a minor nature. Further, the actual amounts of wage differences of the two sides were not great. If amounts alone were the cause of failure to agree, it appears that an agreement would have been forthcoming.

It is apparent that one thing only stood in the way of agreement. Neither side was prepared to yield on the merit issue.

So far as motive is concerned, there is no evidence, or even suspicion, that Respondent was out to break the Union, or interfere with it, by insisting upon a merit system. It had a practice of many years standing that had been successful. It did not want to abandon that system for the untried one the Union insisted upon as a replacement. Respondent offered some dilution of its system,

and Collotta suggested a modified merit system. However, the Union would not yield, either to Respondent or to Collotta. It insisted to the end, upon a flat rate system Respondent did not like or want. Respondent did not show bad faith or intransigence—to the contrary, it is apparent that Respondent did not want a strike, was willing to compromise, and bargained to the best of its ability, in good faith.

Finally, it is noted that the Union did not budge in its demand for a flat rate system, nor did it offer any suggested compromise, nor did it offer any proposal for participating in a merit system. The Union had struck Respondent early in February, and made it clear that another strike was a possibility. From early in negotiations, the Union seemed to be strike-minded. On January 9 the Union already had set a "deadline of January 31" for its obtaining a "decent contract" (Respondent's Exhibit No. 8); on February 10 the Union was preparing for a strike by selecting captains and planning for strike relief and food stamps (Respondent's Exhibit No. 9); on February 18 the Union exhorted all of Respondent's employees carefully to consider a strike (Respondent's Exhibit No. 11).²⁸

2. The impasse

The fact that a grievance did not exist when an impasse occurred, which fact is alleged in the complaint, is not in dispute but that fact is immaterial.

The fact of impasse clearly is established by the record. It is apparent from the testimony of Long and Smith,

²⁸General Counsel acknowledged at trial, that there was no allegation of bad faith bargaining by Respondent prior to February 17.

discussed in part above, that they considered themselves at impasse at the close of the session on February 26.

Celestino Torres, one of the Union's representatives, attended most of the negotiation sessions and many meetings of Respondent's employees, including the one held on February 26, which was chaired by Smith. At that meeting Smith reported to employees what had occurred earlier in the day, at the negotiation session with Respondent. Torres kept notes of the employee meeting, and identified those notes as Respondent's Exhibit No. 18. Page 2 of those notes states, *inter alia*:

Meeting today—Report
 Reject the Union proposal
 We are deadlocked
 2 Alternatives—to sign last offer
 or strike the Company

On February 26 the Union's negotiating committee addressed a letter to "All Presto Workers,"¹¹ reading in part as follows:

Well, as was said, the choice is ours. We must shoot Presto down tomorrow morning and we must stay out until we get in our two big bosses' pocket books.

A strike vote will be held tonight at 5:00 p.m., at the I.W. Abel Hall, 23 North 35th Avenue, Phoenix, Arizona.

Please attend and exercise our unity to help shorten the strike!!

Mendivil testified that he attended the employee meeting of February 26, and that the employees decided ". . . we weren't getting anyplace with the company and that we would have to go on strike."

¹¹Respondent's Exhibit No. 11.

The principal question on this issue is whether the impasse was reached as a result of good faith, hard bargaining or, as alleged by General Counsel, as a result of Respondent's bargaining in bad faith.

The principal moves of both sides during the final bargaining session on February 26 are discussed above. Based upon those moves, it is clear that both sides bargained hard, that both compromised on several positions, that both appeared anxious to reach an agreement, and that the principal impediment was the merit system.³⁰

In assessing the *fides* of the parties, it is necessary to consider the witnesses and their demeanor. Long and Borovay were impressive. Long's recitation of events at the bargaining sessions of February 17 and 26, and attendance of private sessions with Borovay and Herman, was lengthy, detailed, complex and, in several instances, supported by documentary evidence. The possibility of lacing such a presentation with manufactured testimony seems very remote. Long was cross-examined but briefly, and his testimony withstood that cross-examination quite well. Long is credited, and his explanation of events at the two February sessions is accepted as accurate. Borovay, who corroborated Long in several matters, was credited above.

Smith's testimony was not of the same calibre as that of Long, and his demeanor throughout the trial was not as im-

³⁰It is noted that the parties were bargaining for an initial contract; they had no bargaining history. Whether either party, or both parties, would retreat from their positions if and when a second contract was negotiated is speculative. However, the question of *fides* must be considered in light of the relationship between Respondent and the Union. Obviously, the bargaining stance of the parties was considered by the Union when it later contended that its best offer must be accepted by Respondent.

pressive as that of Long. Smith appeared to be quick to allege bad faith, and to accuse Respondent of doing wrong things. His testimony was less lengthy and detailed than that of Long, and he exposed much on cross-examination that explained his direct examination. As between the two, upon whose versions a finding must in large measure rest, Long appeared to be the more reliable. Based upon the sequence of events of February 17 and 26, and upon the testimony of record, it is clear, and found, that Respondent did not, as alleged, cause or contribute to an impasse in negotiations with the Union by acting or bargaining in bad faith.

General Counsel argues that the fact of impasse after only one or two meetings indicates Respondent's bad faith, and cites cases in support of that proposition. However, neither those cases nor common sense teach that an impasse may not be reached at even a single session. Facts of cases differ. Here, Smith already had set a deadline of January 31 for a contract, and throughout the record it is apparent that Smith was in a hurry. On one occasion, February 9, he called a strike solely in order to speed up the bargaining process. Prior to February 17 Smith repeatedly pressed Long for early action, and obtained Long's assurance that Respondent's complete and final economic proposal would be presented to the Union on February 17. That proposal was given, but the Union did not accept it, or offer reasonably to compromise the principal issue preventing agreement. Finally, Smith agreed with Long, that there would be no retroactivity unless the parties could reach agreement for a contract no later than February 18. Under such circumstances, on impasse as of February 26, when both sides

held to their last offers, was a logical conclusion of bargaining efforts. Neither side was in a mood to bargain further, and the fact that numerous bargaining sessions were not held thereafter, does not bring into play a legal proposition that Respondent was bargaining in bad faith. The Union was trying to force Respondent to give up a personnel practice of longstanding, dating from the inception of Respondent's existence, and substitute therefor, a system of promotion that was alien to Respondent and to the peculiarities of Respondent's business. It is understandable that Respondent would bargain hard to resist a system that did not take into account the fact that approximately 90 percent of Respondent's employees were hired without experience. Respondent trained nearly all its employees, and the dictates of business would militate against rewarding all employees with promotion in exactly the same manner, as the Union insisted upon. There is nothing in this record to show that Respondent was acting in bad faith when it was willing to take a strike rather than to change its promotion practice to suit the Union. Further, it was Respondent, not the Union, that offered a compromise position for both sides. That offer was rejected by the Union, without making a realistic counteroffer.

The Union pushed Respondent to the limit, and is not in a position now to complain that Respondent acted in bad faith by not giving up the fight.³¹

³¹General Counsel's argument that Respondent's proposal was unconditional, and would deprive the Union of any substantial participation in wage establishment, is without merit. The proposal, as compromised by Respondent, did provide the Union with substantial participation in timing, amounts, regularization of reviews, and minimum rates of wages for unit employees. Further, as previously noted, the Union agreed to accept Respondent's offer after its strike failed.

3. Implementation of Respondent's wage proposal

Paragraph 14 of the complaint alleges that, on or about February 26, Respondent announced and unilaterally implemented its economic proposal. The wage proposal referred to is Respondent's final/final proposal submitted to the Union on February 17.

As discussed above, the parties reached an impasse on February 26 and did not reach an agreement for a bargaining contract, primarily because of a difference concerning merit promotions.

On February 18 Borovay wrote a memorandum to all of Respondent's employees, stating that Respondent had negotiated with the Union on February 17 until 1:00 a.m. Attached to the memorandum was a copy of Respondent's final offer to the Union.

There is no dispute concerning the fact that, during the afternoon of February 26 and on February 27, Herman met individually in his office with approximately 50 employees and their supervisors. Herman credibly testified that he said the same thing to each employee, i.e.: "On the advice of my counsel, I understand that we are now at impasse. And on the advice of my counsel . . . I now may effectively implement our wage proposal. As of March 3, your wage will be . . . , including merit." The amounts of wages quoted to employees were the amounts that are encircled on General Counsel's Exhibit No. 26.

Herman testified that, in order to reach an agreement with the Union as early as possible, and to protect Respondent against another strike, all unit employees were evaluated for merit increases in advance of the negotiation

scheduled for February 17. The evaluations commenced in late January and were attended by Herman, Borovay, and appropriate supervisors. Representatives of West Coast were in attendance at some, or possibly all, the evaluations. The amounts proposed as merit increases for all employees are at the extreme right side of General Counsel's 26. Herman testified that the amounts of the increases are in accordance with past practice.²² He further testified that, in giving the raises, Respondent took into consideration the fact that employees had not been given raises since June 1980.

General Counsel first argues that the increases given to employees were not given in the face of a real impasse, since the impasse was achieved by Respondent in bad faith, in order to undercut the Union. The record does not support such a finding, as discussed above.

General Counsel argues that "The Respondent's unilateral wage increases on February 26, determined before the first economic offer was presented, derogated the Union's representative status, was tantamount to dealing directly with the employees, and clearly violated Section 8(a)(1) and (5) of the Act."²³ However, that argument misses the point. Respondent's purpose in preparing General Counsel's Exhibit No. 26 was not to undercut the Union, or to deal directly with employees. The purpose was to assist in preparing an offer to the Union, and no employee was told that he was being evaluated or would be

²²Counsel stipulated that unit employees received a wage increase on February 26, as shown by circled amounts on General Counsel's 26, and that unit employees have not, to date, received another wage increase from Respondent.

²³General Counsel's brief, page 14.

offered a raise. The figures originally arrived at were tentative, often were changed, and reflected how far Respondent was prepared to go in negotiations. The first time employees were told about raises was after the Union and Respondent were at impasse.

General Counsel argues that, even assuming a good faith impasse, Respondent's implementation of raises was a violation of the Act because it was an implementation of only a part of its last offer to the Union, and further, that Respondent's implementation must be "reasonably comprehended within the employer's pre-impasse proposals,"³⁴ which it was not.

In view of the nature of an impasse, there is no requirement that an employer who implements some of his proposals, must implement his entire proposal. As the Board stated in *Hi-Way Billboards, Inc.*:³⁵

. . . A genuine impasse in negotiations is synonymous with a deadlock: the parties have discussed a subject or subjects in good faith, and, despite their efforts to achieve agreement with respect to such, neither party is willing to move from its respective position. When such a deadlock is reached between the parties, the duty to bargain about the subject matter of the impasse merely becomes dormant until changed circumstances indicate that an agreement may be possible. Once a genuine impasse is reached, the parties can concurrently exert economic pressure on each other: the union can call for a strike; the employer can engage in a lockout, make unilateral (sic) changes in working

³⁴*Pease Company*, 251 NLRB 540, enf. 603 F.2d 225 (C.A. 9, 1979); *Providence Medical Center*, 243 NLRB 714.

³⁵206 NLRB 22, 23.

conditions if they are consistent with the offers the union has rejected, or hire replacements to counter the loss of striking employees. Such economic pressure usually breaks the stalemate between the parties, changes the circumstances of the bargaining atmosphere, and revives the parties' duty to bargain.

Thus, a genuine impasse is akin to a hiatus in negotiations. In the overall ongoing process of collective bargaining, it is merely a point at which the parties cease to negotiate and often resort to forms of economic persuasion to establish the primacy of their negotiating position . . . (Footnotes omitted.)

General Counsel argues, however, that, in not implementing benefits other than wages, Respondent did not implement what was "reasonably comprehended" by its final/final offer, and further, that the new wages for employees included merit increases that exceeded the amounts of past merit increases; included merit increases for employees (top grades) who in the past received only nonmerit increases; and constituted an across-the-board raise that in the past had not been given to employees.

So far as not implementing proposed benefits as well as wages is concerned, that omission does not, of itself, invalidate Respondent's actions. That portion of its proposal implemented by Respondent is entitled: "I. Wages/Classifications/Grades." The "Other Economics Proposed" starts with Section II. Under the law enunciated above, all matters other than wages still are outstanding, possibly later to be the subject of negotiation. Benefits, as well as all items other than wages, classifications and grades, are "dormant" until they are again taken up by the parties.

A different question is the one that relates to the merit raises. In his brief, General Counsel does not clearly distinguish Respondent's final/final proposal from the rough worksheet Respondent used in evaluating, classifying and grading its employees for the purpose of negotiating with the Union. So far as the record shows, Respondent's announced wage increases did not depart from its final/final proposal, although the record is not complete, in that starting dates are not shown for all employees subject to the proposal. The proposal has automatic start rates and progressions after 90 days. Thereafter, the amounts to be given at 6 months and beyond are to be given on "merit," with no predetermined figures shown. It is this last fact, of course, that the Union objected to during negotiations. The record also is not complete in that it does not include an exact comparison of past raises for all employees, with the raises given on February 26 and 27. General Counsel argues that the new raises are substantially more than past raises, but that is speculative, since exact comparisons are not, and possibly could not, be made, and further, no raises were given between June 1980 and February 1981.³⁶ Equally incomplete is the record so far as "top grades" are concerned. Some of them got raises February 26-27, as General Counsel points out, but Herman testified that those grades were evaluated once or twice each year and given raises, even though they did not participate in merit raises. The fact that General Counsel's 26 shows those individuals as scheduled for increases, does not, in and of itself, establish a departure from past practice. So far as the "across-the-board" nature of the raises is concerned, Herman testified, as stated by General Counsel, that he could not remem-

³⁶This failure to give raises is not alleged, and is not found, to be a violation of the Act.

ber any such raises, but that there may have been raises for "80 percent, whatever." When later he was questioned, he said he did not think they ever gave 100 percent of the salaried employees raises. The record is not complete or conclusive on this point, but it is clear that, even as of February 26-27, not all employees were given raises. No employees' wages were reduced, however.

Although the record is not as clear or complete as it could be, it is clear that the parties arrived at an impasse on the matter of merit raises; that Respondent thereafter gave raises that encompassed both automatic progressions and merit increases; and that the raises substantially were in accord with Respondent's final/final offer to the Union. The Union was informed by Long of Respondent's intended action, and the Union was aware of the nature of the proposed increases as a result of negotiations based upon General Counsel's Exhibit No. 26. No violation of the Act is found, so far as this issue is concerned.³⁷

4. Alleged interrogation by Jarling

Paragraph 17 of the complaint alleges that, on or about October 30, 1980 and on various dates thereafter, Walter Jarling coercively interrogated employees concerning union meetings.

³⁷General Counsel argues that Respondent's bad faith is shown by the fact that Respondent started negotiations after it already had begun to evaluate employees, thus Respondent went into negotiations with fixed intentions. However, as pointed out above, the core issue was not amounts of pay—both sides showed some willingness to compromise amounts. The real problem was the matter of merit raises, irrespective of the amounts of those raises. Respondent implemented what it argued for during negotiations—a combination of fixed and merit raises.

Jarling,²⁸ who no longer works for Respondent, was a corerom supervisor for Respondent at times relevant herein.

Raymond Maestas, no longer an employee of Respondent, testified that, from October 1980 through March 1981 he was employed by Respondent and that his supervisor was Jarling. Maestas said he was a union organizer, and a member of the Union. Beginning prior to Christmas 1980 he wore union insignia at work, two or three times each week. Maestas testified: During the Union's organizational campaign, Jarling frequently questioned him about union meetings, the days following the meetings. Jarling asked how many people attended the meetings, and asked the names of those who attended. Those conversations occurred in late 1980 and on many different occasions until after March 6, 1981.

Jarling testified: During late 1980, and well into 1981, when the Union was holding meetings over beer in a lounge, Maestas and employee Manny Sianez frequently asked him to go to the meetings with them. The witness declined the invitations, which he received once each week or two weeks. After the meetings were moved to the union hall, he received no more invitations. Jarling testified:

Q. The day after the meeting, did you have conversations with Mr. Maestas about the meeting?

A. No. The only thing that—when they had them over to the beer bust and he'd come back in the morning, I'd say "Well, did you get a load on last night?" And he would say—well I'd say to him did you have enough beer and he would say "No, I don't drink beer, they buy me liquor."

²⁸Jarling's supervisory status is admitted by Respondent.

Q. Have you told us everything that you recall about any conversations that you had with Mr. Maestas, concerning the Union?

A. Well, only one time—well, it was after the first strike, that they were on, he had told me that he didn't know whether he should go with the Union anymore. And he had buttons and caps that he was wearing and he took it all off and even gave me a couple of those pencil clip holders from the Union.

Jarling denied that he ever asked Maestas how many people attended the meetings, or who attended them. He said that was not necessary, since the identity of those who went was common knowledge in the shop.

Discussion

Jarling was an impressive witness. He was an older person who appeared to be retired, and seemed quite sincere and candid. He was not cross-examined.

Because of the absence of support for Maestas' testimony, and the convincing nature of Jarling's recitation, Jarling is credited and it is found that this allegation was not proved.

5. Alleged statements by Jarling and Bustos

Paragraph 18 of the complaint alleges that, on or about February 2 and 5, John Bustos and Jarling, respectively, advised employees that unit employees would receive wage increases if they did not support the Union in the event of a strike.

Bustos has been a supervisor of the aluminum foundry since August 1980."

"Respondent admits Bustos' supervisory status.

Maestas testified that he talked with Jarling in February, on a date he cannot remember, but prior to the strike of February 9:

A. Well, he was telling me that whoever passes the picket line would automatically get a raise.

Q. Did he say anything else?

A. Oh, I asked him how much of a raise the employees get. He said between \$.50 and \$.35 an hour more.

Q. Was anything else said?

A. Yes, I asked him how much of a raise I would have gotten, you know, if I'd pass the picket line. He told me \$.50 because I'm a shell core operator and I told him about my wife, you know, for coincidence how much she'd be getting if she passed the picket line. He said \$.35.

Jarling testified that he never told Maestas, or anyone else, that he would earn more money if he crossed a picket line.

Robert Koller, a laborer for Respondent from March 1980 until August 14, 1981 testified that he talked with Bustos, his supervisor, on February 4:

Q. Mr. Koller, during your conversation with Mr. Bustos, was anything said about a raise?

A. Yeah, he said people who crossed the picket lines would get their raises and that these raises were being offered to everybody if we accepted the contract, but if you crossed the picket line you would get the raise.

Bustos testified that he frequently talked with Koller, mostly about sports, and denied that he ever talked with Koller about the Steelworkers Union. He said he remem-

bered talking with Koller in February, when Koller approached him:

Before I—you know, I used to work in construction and I was in the Union and he just asked me if the Union was good. I said, "If it was good, I wouldn't be here." I said because it would be good but—I told him, you know, I was laid-off a lot of times, you know. Worked two or three weeks then go back and work another week and laid off again, so I just, you know, quit the Union.

Bustos said he told Koller that his former union was Laborers International. Bustos denied telling Koller that Respondent would pay employees who would cross a picket line, and he testified that, in February 1981, he knew nothing about negotiations between Respondent and the Union. Bustos further testified that he talked with Loera sometime in February:

... He came to me one morning and he asked me about this. He said, "Hey John, it is true that if we cross the picket line we get more money?" I was surprised, I didn't even know myself. You know, I said, "I don't know, why?" He said, "Well you know what I heard." At that time there was another supervisor there, Ralph Fazzari, so I went and asked him. I said, "Hey Ralph," I told him what happened, you know, "Is it true that if you cross the picket line?" I said, "No, I don't know. I don't think so, I haven't heard nothing." I just went back and told him. That was it. That was that conversation right there.

Q. You went back and told Norberto that, no he wasn't going to get anymore money?

A. That's right.

Herman testified that, sometime in February, he met with employees Joe Rodriguez, Pasqual Estrada, Norbert Loera, Cas Loera and Roy Rois, after Rodriguez initiated a conversation. Rodriguez was the spokesman, and asked why he could not receive more money for having crossed the picket line during the strike of February 9 and 10. Herman said he replied:

I responded and told him he knew bloody well that we couldn't do that. It was illegal. No promises had been made to him. He responded to me, "Well damn it, it ought to be worth something, and if that's the case, you're telling me we're no different than those blankety-blanks who went out." I told Joe that it was illegal, as we have told them all along. That we had made no promises to anyone and what he did with his actions was his affair.

Ralph Fazzari, a foundry supervisor,⁴⁰ testified that he talked with Rodriguez several days after February 10, and that Estrada also was present. Fazzari testified that Rodriguez wanted to know why there wasn't any more money in the paycheck that day, because he crossed the picket line during the strike and expected more money. Fazzari told Rodriguez such an idea was "totally unfounded" since Respondent was restricted by law from rewarding employees for crossing picket lines, and he asked Rodriguez the source of such an idea. Rodriguez could not give the answer. Fazzari was present when Herman met with the employees named above, and generally corroborated Herman's version of that meeting. Fazzari corroborated Bustos' testimony concerning Bustos' inquiry after talking with Loera.

⁴⁰Fazzari's supervisory status is not in dispute.

Discussion

The credibility of Maestas and Jarling are discussed above. Jarling was not cross-examined.

The only basis for resolving this issue is the credibility of witnesses. Their testimony was brief, and each is without independent support. Maestas' testimony appeared on its face to be doubtful, since he testified that Jarling told him the amount of the raise for refusing to cross a picket line (note—in the future, since there was no strike until February 9) depended upon work classification, and Maestas quoted the amounts of the alleged possible raises, both for himself and his wife. The two subjects—crossing the picket lines and receiving raises based upon work classification—seemed so unrelated that the possibility of confusion in Maestas' mind suggests itself.

As previously discussed, Jarling was an impressive witness, who no longer works for Respondent. He is credited, and no violation of the Act is found, so far as this allegation is concerned.

So far as the other testimony on this issue is concerned, it is noted initially that neither Loera nor Rodriguez, nor any other unit employee allegedly involved, was called to testify. It is apparent that the possibility of employees being rewarded for crossing picket lines was common shop talk in February. The source of that rumor was not established, but at the time it was being passed around, another subject also was uppermost in employees' minds, i.e., the possibility of a strike. Both Respondent and the Union were keeping employees advised of negotiation developments, and those negotiations were a subject of much employee concern and interest. It is not possible, on the

record, to determine whether some employees who crossed the picket line expected, and requested, an after-the-fact reward for so doing, or whether Respondent made an offer to reward employees if they later crossed the line. Maestas spoke of future rewards, by way of raises based upon job classification, and Koller spoke of merely being paid to cross the picket line. Bustos testified that Loera asked him about "more money" if employees crossed the picket line, and Herman testified that the group of employees he met with wanted "more money" for having already crossed the picket line on February 9 or 10.

Commencing in January, Garza and Nels Umble of West Coast began meeting with Respondent's supervisors and instructing them in the "do's and don'ts" of union organization. At least four meetings were held in January and February, and Herman and Borovay were in attendance. Herman credibly testified that he impressed upon supervisors, the requirement that they closely abide by the instructions of Garza and Umble. Herman and Borovay credibly testified that a "Strike Guide for Management"¹ was discussed at a meeting of supervisors in February, and that it was explained in detail by Garza and Umble.

The fact that supervisors were trained in organizational conduct is not controlling, but in the absence of direct evidence other than the testimony of witnesses, involved in alleged violations of the law, that fact must be, and is, considered.

In view of the inconclusive testimony of Maestas and Koller, and the contradictory testimony of other witnesses

¹Respondent's Exhibit No. 3.

involved in this allegation, it cannot be said that the record supports a finding that Respondent violated the Act as alleged. A possible scenario would be that Respondent first told some employees that they would be rewarded if they crossed the picket lines, but later, upon learning that such action would be illegal, recanted the promise. However, that scenario is highly speculative, and is not accepted.

This allegation is not supported by the record.

C. *Case No. 28-CA-6344*

1. Paragraph 20 of the complaint alleges that the strike of February 27 to March 6 was an unfair labor practice.

In order to sustain the burden of proof on this issue, General Counsel would have to establish that Respondent's unfair labor practices caused the strike, or caused the strike to be prolonged.

As shown above, Respondent committed only one unfair labor practice—it refused in 1980 to give unit employees their usual Christmas turkeys. However, also prior to that strike, Respondent gave employees the turkeys in February, and also embodied in their proposal to the Union, a provision relative to Christmas turkeys. The employees knew of Respondent's proposal prior to February 27. General Counsel argues that Respondent's unfair labor practices were discussed at the employee meeting of February 26, but the only unfair labor practice they could have discussed concerned the turkeys, and it is quite clear that the employees did not strike, wholly or partially, because of the turkeys.

The reason for the strike was the failure of the Union to bring Respondent to heel on the merit pay issue. That fact is shown beyond any reasonable doubt, throughout the record. Smith made it clear in his testimony that money was the basis of the strike. Koller testified relative to the employee meeting of February 26:

Well, the purpose of the meeting was to go over the economic proposal. If we did not like it, we would go on strike again for a better economic proposal.

By letter to Respondent's employees on February 18,⁴² the Union's negotiating committee stated, *inter alia*: "However, the choice is yours. You can strike now and maybe lose or you can wait until we can better economically hurt Boravay and Herman." That letter did not mention unfair labor practices.

On February 26 the Union's negotiating committee again addressed a letter to "All Presto Workers" and stated, *inter alia*: "Either work for what we've got or strike to better ourselves." The letter also stated, ". . . the choice is ours. We must shoot Presto down tomorrow morning and we must all stay out until we get in our two big bosses' pocket books." The letter did not mention unfair labor practices.

Strong testified relative to the employee meeting of February 26, and said "Well, mostly we went back to tell the people what had been said at the meeting and what had been done." Strong mentioned nothing about unfair labor practices.

⁴²Respondent's Exhibit No. 10.

In view of the foregoing, it cannot be found, and is not found, that this allegation is supported by the record. The indicia of an unfair labor practice strike were not shown.⁴³

General Counsel argues that Smith frequently discussed with employees the fact that Respondent was guilty of unfair labor practices, and that some of the picket signs referred to unfair labor practices. It is noted that similar allegations frequently were made at trial, and elsewhere in the record. However, those statements are supported only to the extent shown herein, and making the statements does not alone establish commission by Respondent of unfair labor practices. It is clear that Respondent's employees and the Union were motivated only by one thing when they struck—the desire to obtain a better contract than would result from accepting Respondent's proposal.

It is noted that, after the strike failed and the Union offered to accept Respondent's proposal, nothing was said about unfair labor practices. The argument then centered solely upon whether or not the Union would accept Respondent's offer.

2. Paragraph 12 of the complaint alleges that, on March 6, the Union accepted Respondent's final/final proposal, and Paragraph 13 alleges, in effect, that, since March 6, Respondent and the Union have been bound by that contract.

Smith sent Respondent a mailgram on March 6, quoted *supra*, stating *inter alia*, that the Union accepted Respon-

⁴³*Alco Venetian Blind Co., Inc.*, 253 NLRB 1216; *Gulf Envelope Co.*, 256 NLRB No. 58.

dent's final offer made on February 17. (This refers to what Respondent calls its final/final offer.) Other than that mailgram, Smith did not talk with, or send any correspondence to Respondent or West Coast. Campbell credibly testified that, on March 6, he informed Garza that the Union was terminating the strike and accepting Respondent's final offer and stated "Now we've accepted this final proposal. You're not going to piss backwards on us, are you?" to which Garza shook his head and said, "No." Garza did not testify.

Garza and Campbell (a member of the Union's negotiating team, and a strike captain), were agents of West Coast and the Union, respectively. As contended by General Counsel, Garza's knowledge is imputed to Respondent, and it is found that, as of approximately 2:45 p.m. on March 6, Respondent knew that the Union was accepting Respondent's final/final offer.

The fact that the parties reached an agreement on February 10 relating to all noneconomic items is not in dispute, as discussed above. Although Garza indicated on the cover sheet of the noneconomic proposal that Respondent reserved the right to change, withdraw or present additional proposals on noneconomic items, there is no evidence that the stated right ever was exercised. So far as the record shows, the proposal remained untouched and still existing as of March 6. Although, as noted, the noneconomic agreement was not a separate, enforceable contract, it nevertheless represented a portion of a contract to which the parties had agreed, and the fact is not in dispute that the parties treated economics and noneconomics separately. Respondent was not prepared to offer any economic pro-

posals until noneconomic matters had been agreed to. The sequence of negotiations followed the desires of Respondent, acceded to by the Union.

General Counsel principally relies upon *Pepsi-Cola Bottling Company of Mason City, Iowa*, 251 NLRB 187, enf. F.2d, (C.A. 8, 1981) in support of the proposition that a counteroffer does not necessarily reject a bargaining agreement offer, although under general contract law a counteroffer constitutes rejection of an offer.

The facts of *Pepsi-Cola*, while not exactly the same as those herein, essentially are the same, and the law of *Pepsi-Cola* controls this issue. In that case the ALJ stated, *inter alia*:

. . . There can be no quarrel with Respondent's view that under strict principles of contract law, an offer, once rejected, no longer exists. However, as the General Counsel observes, ". . . the Board is (not) strictly bound by the technical rules of contract law." *N.L.R.B. v. Donkin's Inn, Inc.*, 532 F.2d 138, 141-142 (C.A. 9, 1976). Consistent therewith, in a ruling which I find not materially distinct from the issue framed here, the Board held that an employer violated Section 8(a)(5) of the Act by its refusal to enter a written agreement based on its previously made complete contract proposal accepted by the Union, but only after the latter had rejected that offer on two prior occasions. See *Penasquitos Gardens, Inc.*, 236 NLRB 994, 995, enf. 604 F.2d 225 (C.A. 9, 1979). As I understand the precedent of the Board, a complete package proposal made on behalf of either party through negotiations remains viable, and upon acceptance *in toto* must be executed as part of the statutory duty to bargain in good faith, unless expressly withdrawn prior to such acceptance,

or defeated by an event upon which the offer was expressly made contingent at a time prior to acceptance. Respondent in the instant case took no such steps and when the Union abandoned all collateral demands, and elected to accept this complete package, a binding agreement was consummate. . . . (Footnote omitted.)

Long testified that, after Garza told him what Campbell had said about the Union accepting Respondent's final/final offer,⁴⁴ he ". . . instructed Garza to call FMCS and advise FMCS that we pulled the offer off the table." Long testified that Garza later told him that FMCS had been notified, and Smith testified that Collotta told him at approximately 3:45 p.m. (note: which was approximately 1 hour after Campbell talked with Garza) that Respondent had withdrawn its final/final offer. Respondent did not receive the Union's acceptance mailgram until March 7, but that is immaterial in view of Campbell's conversation with Garza.⁴⁵ Long's immediate reaction after his talk with Garza was his recognition of the fact that technically, under ordinary contract law, Respondent's offer had to be withdrawn prior to notice of acceptance having been received. However, Long acted after Respondent already had been notified of the Union's intent to accept. As pointed out by General Counsel, the inquiry is whether the parties

⁴⁴Long testified that Garza's information was a rumor, but Garza did not testify, and Campbell's direct testimony on this point was credited *supra*.

⁴⁵The fact that contract law in the ordinary sense would require written, rather than oral, acceptance is not considered controlling herein. Garza had actual notice of acceptance, and only that actual notice triggered Respondent's attempted withdrawal of the offer.

had reached agreement, not whether technical contract law had been adhered to."

Respondent argues that the offer of February 17 was conditional upon several factors, and thus was not an offer that could ripen into a contract by acceptance. In support of that argument Respondent refers to the lack of a date certain for implementation of new contract rates; lack of dates on which various wage increases would be implemented; the fact that the Union's proposals of February 26 compelled Respondent to withdraw its prior offer of retroactivity and all fringe benefit concessions; the fact that Smith alone accepted Respondent's offer, after Respondent's employees already had rejected the proposal; and the fact that, unlike in *Pepsi-Cola*, the collective-bargaining process here had been complete as of February 26.

Respondent's arguments are considered to be without merit. Respondent's final/final offer is clear and unambiguous. It is for a 1-year term. A lengthy explanation under "Progression" on pages 2, 3 and 4 of the offer removes any question about the application of starting rates of employees, and rates to be applied thereafter. In view of Respondent's bargaining stance, and its insistence upon the finality of its proposal, it is unrealistic to contend that the proposal contained any doubt, or contingencies, or conditions. So far as Smith alone accepting the offer is concerned, there is nothing to show that his action was improper or illegal—Smith was the employees' elected representative. Further, the employees abandoned the strike and returned to work as Smith advised Respondent they would. So far as the bargaining process is concerned, the union represented

⁴⁴*Penasquitos, supra; Donkins Inn, Inc.*, 532 F.2d 138 (C.A. 9, 1976), cert. denied 429 U.S. 895 (1976).

the employees when the contract was accepted, and that representation did not cease only because the parties arrived at impasse. Further, the fact that impasse was reached and bargaining broke off, did not sever the relationship between the parties, nor did it affect the responsibilities of the parties to continue to bargain. The impasse was brought about by failure to agree upon only a part of a contract, and resulted only in a dormant—not a dead—relationship between Respondent and the Union.”

It is found that Respondent and the Union agreed upon, and are bound by, all terms of a contract effective March 6, 1981; that those terms are embodied in General Counsel's Exhibits Nos. 9 (noneconomic) and 18 (economic); that the Union requested, and Respondent refused, Respondent's recognition and execution of the contract; and that Respondent's refusal to recognize and execute the contract violated Section 8(a)(5) and (1) of the Act, as alleged.

3. Paragraphs 17 and 18 of the complaint allege, in effect, that Respondent has repudiated and failed to comply with the provisions of, the contract of March 6.

The contract between the parties provides for the processing of grievances and wage check-offs for union dues. On March 9 the Union presented grievances to Respondent on behalf of unit employees, and Respondent refused to accept or process them. On March 16 Smith requested dues checkoffs on behalf of unit employees, and Respondent refused that request. In May the Union again presented grievances to the Union on behalf of unit employees, and Respondent refused to accept or process the grievances.

“Hi-Way Billboards, Inc., *supra*.

By reason of Respondent's refusal to abide by grievance and dues checkoffs provisions of its contract with the Union, Respondent violated Section 8(a)(5) and (1) of the Act, as alleged.

4. Paragraphs 23 and 24 of the complaint allege, in substance, that since March 9 Respondent has failed and refused to honor employees' unconditional applications for reinstatement, and has placed unlawful conditions upon the reinstatement of striking employees.

On March 6 the Union sent a mailgram to Respondent making unconditional application for reinstatement of employees, with offer to return to work on March 9. A similar request was sent by the Union to Respondent on March 11. Individual employees who reported for work March 9 also made unconditional applications for reinstatement. It is clear, and found, that all employees, including those who reported to work on March 9, were willing and ready to work, without any condition attached to their return.

When employees returned to report for work, 13 of them (a total of approximately 60 employees returned) signed the following form prepared and given to them by Respondent:

Unconditional Offer to Return to Work

I hereby make an unconditional offer to return to work at Presto Casting Company. I understand that if there is no position available for me at this time I will be placed on a preferred rehire list and recalled if and when a position becomes available. I also understand that it is my obligation to keep the Company informed of my current address.

Name Printed

Signature

Date

Time

Respondent contends that signing of the form was not a condition of reinstatement, but rather, it was to assist Respondent in evaluating its scheduling requirements, and to make direct communication with employees more efficient.

Strong testified that Herman's son, a supervisor, showed him the form and said "Sign it and we'll be calling you as we need you." Later, Strong testified that he heard the supervisor say "... he needed to know our addresses and phone number 'cause he was going to be recalling some of the guys back."

Campbell credibly testified that, when he reported for work at approximately 7:15 a.m. on March 9, with other employees, they were greeted by their respective supervisors, and they were shown the form (G.C. 3):

He handed it to me and said "Read this and sign it." I read it and I looked at him and said "What if I refuse to sign this?" At that point James Herman, who was standing just a few feet from Steve Herman, turned around and walked over to me and he said "At that point, consider yourself permanently replaced." I turned around and left.

Campbell said he did not sign the form, nor did he see anyone else sign it.

Mendivil corroborated Campbell on this point.

Maestas testified that Steve Herman (a supervisor) "made us sign the papers (G.C. 31), and said Respondent needed them in order to provide information to be used in recalling employees to work." Maestas said Steve Herman did not say Maestas' job depended upon signing the form.

Herman testified that returning employees were asked to sign the form. Herman testified relative to his conversation with Campbell.

I indicated to him, as I did to others, that we had to reschedule, we had to schedule work loads to be able to take people in and we needed their last known address and telephone number.

Herman said he told Strong approximately the same thing he told Campbell. Herman testified that he never stated to any employee that signing the form was a condition to return to work.

Discussion

The strike of February 27 to March 6 was an economic strike, not an unfair labor practice strike, as discussed above. The strikers therefore were entitled to reinstatement unless they had been permanently replaced while they were on strike. Many returning strikers were reinstated, but not all of them were reinstated immediately upon their reporting for work on March 9.⁴⁸ It was Respondent's burden to show that returning strikers were not immediately reinstated because they had been permanently replaced, and that burden was not met. There is no evidence that any striker had been replaced as of the time the strikers unconditionally offered to return to work. Further, Respondent offered no evidence to justify its delay in returning strikers to their jobs, on the basis of business necessity.⁴⁹ On this record, Respondent failed to meet the requirements of the Act when it did not reinstate the economic strikers immediately upon their unconditional offer on March 9, to

⁴⁸General Counsel's Exhibit No. 16.

⁴⁹*The Laidlaw Corporation*, 171 NLRB 1368.

return to work. A remedial order therefore will issue as requested by the General Counsel, regardless of the fact that an 8(a)(3) allegation of failure or refusal to reinstate economic strikers is not alleged in the complaint.

So far as General Counsel's Exhibit No. 31 is concerned, Respondent argues that only 13 of 60 striking employees signed the form, and further, that return to work was not conditional, expressly or impliedly, upon employees signing the form.

Respondent acknowledges in its brief that "... the form could have been misconstrued" Strong credibly testified that on March 9, "They made us sign papers [note: G.C. 31] in order to go back to work in the future." Campbell credibly testified James Herman told him that, if Campbell refused to sign the form, Campbell must "... consider yourself permanently replaced." Mendivil credibly testified he heard Herman state to Campbell that, if Campbell did not sign the form "... that was it." Maestas credibly testified that "... they made me sign," and that he returned to work the following day.

It is clear, and found, that Respondent at least impliedly, and probably expressly, told employees their reinstatement was conditional upon their signing the form quoted *supra*. Whether fewer than all employees were so told, is immaterial.

Respondent violated Section 8(a)(3) and (1) of the Act in requiring employees to sign the form, as alleged.²²

²²*Harowe Servo Controls, Inc.*, 250 NLRB No. 120.

Conclusions of Law

1. Presto Casting Company is, and at all times material herein has been, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. United Steelworkers of America, AFL-CIO-CLC, is, and at all times material herein has been, a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(5) and (1) of the Act by: discontinuing its past practice of giving employees annual Christmas gifts of turkeys, without first notifying or bargaining with the Union; by failing and refusing to acknowledge and sign a 1-year agreement with the Union, reached on March 6, 1981; and by refusing to honor and implement the provisions of said contract of March 6, 1981 relating to dues checkoffs and employee grievances.

4. Respondent violated Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate economic strikers upon their unconditional offer to return to work; and by requiring that said economic strikers sign a company-prepared request for reinstatement as a condition of reinstatement.

The Remedy

Having found that Respondent has engaged in unfair labor practices, it is recommended that Respondent be ordered to cease and desist therefrom, and to take certain affirmative action designed to effectuate the policies of the Act.

It is recommended that Respondent be ordered forthwith to sign the 1-year agreement it reached with the Union on March 6, 1981; to give retroactive effect to all terms and

conditions of said agreement; and to make whole all unit employees for any losses they may have incurred,⁵¹ with interest thereon to be computed in the manner prescribed in *F. W. Woolworth Company*, 90 NLRB 289 (1950), plus interest as set forth in *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962) and *Florida Steel Corporation*, 231 NLRB 651 (1977).

Upon the basis of the foregoing findings of fact and conclusions of law, and upon the entire record in this case, and pursuant to Section 10(c) of the Act, I hereby issue the following recommended:⁵²

ORDER

Respondent, Presto Casting Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Violating Section 8(a)(5) and (1) of the Act by discontinuing its past practice of giving employees annual Christmas gifts of turkeys, without first notifying or bargaining with the Union; failing and refusing to acknowledge and sign a 1-year agreement with the Union, reached on March 6, 1981; and refusing to honor and implement the provisions of said contract of March 6, 1981 relating to dues checkoffs and employee grievances.

⁵¹The dates and times that all returning strikers were reinstated, were not litigated. Those matters, together with reasons, if any, for delay, are referred to the compliance stage of these proceedings.

⁵²In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

(b) Violating Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate economic strikers who were not permanently replaced during their strike, upon their unconditional offer to return to work; and by requiring that said economic strikers sign a company-prepared request for reinstatement as a condition of reinstatement.

(c) In any like or related manner interfering with, restraining or coercing employees in the exercise of their rights under Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Forthwith sign and acknowledge the contract reached with the Union on March 6, 1971 (sic), and give said contract retroactive effect to said date of March 6, 1981.

(b) Make whole all employees who suffered any losses by reason of failure to sign said contract on March 6, 1981, and by reason of failing and refusing to reinstate economic strikers who were not permanently replaced during their strike, upon their unconditional offer to return to work, with interest, as described above.

(c) Preserve and, upon request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to compute the amount of backpay due under the terms of this Order.

(d) Post at its Glendale and Phoenix, Arizona facilities copies of the attached notice marked "Appendix."³ Copies of the notice, on forms provided by the Regional Director for Region 28, after being duly signed by its authorized representative, shall be posted by Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that said notices are not altered, defaced or covered by any other material.

(e) Notify the Regional Director for Region 28, in writing, within 20 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated: February 10, 1982

/s/ Russell L. Stevens
Administrative Law Judge

³In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX
NOTICE TO
EMPLOYEES

[SEAL]

[SEAL]

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

After a trial at which all parties had an opportunity to present evidence, the National Labor Relations Board has found that we violated the National Labor Relations Act and we have been ordered to post this notice.

WE WILL NOT violate Section 8(a)(5) and (1) of the Act by discontinuing our past practice of giving employees annual Christmas gifts of turkeys, without first notifying or bargaining with the Union; by failing and refusing to acknowledge and sign a 1-year agreement with the Union, reached on March 6, 1981; and by refusing to honor and implement the provisions of said contract of March 6, 1981 relating to dues checkoffs and employee grievances.

WE WILL NOT violate Section 8(a)(3) and (1) of the Act by failing and refusing to reinstate economic strikers who were not permanently replaced during their strike, upon their unconditional offer to return to work; and by requiring that said economic strikers sign a company-prepared request for reinstatement as a condition of reinstatement.

WE WILL NOT in any like or related manner interfere with, restrain or coerce our employees in the exercise of their rights under Section 7 of the Act.

WE WILL forthwith sign and acknowledge the contract reached with the Union on March 6, 1971 (sic), and give said contract retroactive effect to said date of March 6, 1981.

WE WILL make whole all employees who suffered any losses by reason of failure to sign said contract on March 6, 1981, and by reason of our failing and refusing to reinstate economic strikers who were not permanently replaced during their strike, upon their unconditional offer to return to work, with interest.

Presto Casting Company
(Employer)

DatedBy
(Representative) (Title)

**THIS IS AN OFFICIAL NOTICE AND
MUST NOT BE DEFACED BY ANYONE**

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, 3030 N. Central Ave., 2nd Floor, Box 33069, Phoenix, AZ 85067, Telephone Number: (602) 244-2362.

No. 83-556

Office - Supreme Court, U.S.
FILED

NOV 8 1983

ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1983

PRESTO CASTING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

**ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT**

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD IN OPPOSITION**

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QUESTION PRESENTED

Whether the Board properly found that petitioner violated Section 8(a)(5) and (1) of the National Labor Relations Act (29 U.S.C. 158(a)(5) and (1)) by refusing to acknowledge and sign a collective bargaining agreement reached with the union and by refusing to implement provisions of that contract relating to dues checkoffs and employee grievances.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-556

PRESTO CASTING COMPANY, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**BRIEF FOR THE NATIONAL LABOR RELATIONS
BOARD IN OPPOSITION**

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A8) is reported at 708 F.2d 495. The Decision and Order of the National Labor Relations Board (Pet. S. App. A10-A71)¹ is reported at 262 N.L.R.B. 346.

JURISDICTION

The decision of the court of appeals (Pet. App. A1-A8) was issued on June 16, 1983, and judgment was entered on September 7, 1983. A petition for rehearing was denied on August 2, 1983. The petition for a writ of certiorari was filed on September 30, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

¹"Pet. S. App." citations are to the supplemental appendix filed subsequent to filing of the petition. "Pet. App." citations are to the appendix accompanying the petition.

STATUTE INVOLVED

Relevant provisions of the National Labor Relations Act, 29 U.S.C. (& Supp. V) 151 *et seq.*, are set forth at Pet. App. A8.

STATEMENT

1. Petitioner operates a metal casting plant in Phoenix, Arizona, that produces parts for the aerospace industry. The union² was certified as collective bargaining representative of petitioner's production and maintenance employees in November 1980, and the parties began contract negotiations in December 1980. The parties agreed at the outset of negotiations to treat noneconomic and economic issues separately. Pet. S. App. A18.

The union called a strike on February 9, 1981, after negotiations broke down between Garza, the company negotiator, and Smith, the union representative. Garza was replaced by a new negotiator, Long, and by February 10 the parties had reached agreement on all noneconomic issues. Pet. S. App. A19-A20. On that date the union requested and petitioner agreed that if the economic issues were resolved before February 18, petitioner would make wage rates retroactive to the date of the union's certification. The parties agreed to meet on February 17 to attempt to resolve the economic issues. Based on these agreements, the union called off the strike and the employees returned to work on February 11. Pet. S. App. A20-A21.

The parties exchanged proposals and counterproposals on economic issues during a lengthy bargaining session on February 17. Late in the meeting, Long submitted petitioner's final offer. Pet. S. App. A22-A23. The union submitted a counterproposal which Long rejected. The union then made another proposal, but Long reiterated the finality of the last offer and declared negotiations at an impasse. Pet.

²United Steelworkers of America, AFL-CIO.

S. App. A24-A25. The parties nonetheless agreed to meet again on February 26. Negotiations at the February 26 meeting were unsuccessful and the union went on strike the next day.

On March 6, after a majority of striking employees had returned to work, the union decided to terminate the strike and accept petitioner's final offer. The union sent a mailgram accepting the offer on March 6. Pet. S. App. A27-A28. On that same day, a union representative, Campbell, told Garza that the union was accepting petitioner's final offer, stating that "[n]ow we've accepted this final proposal * * * [y]ou're not going to piss backwards on us, are you?" (Pet. S. App. A57). Garza replied, "No" (*ibid.*). Garza then informed Long that the union was accepting petitioner's final offer. Long, however, notified a federal mediator who had been participating in the negotiations that petitioner wanted to withdraw its final offer, and the mediator so informed the union. Petitioner received the union's acceptance mailgram on March 7. Pet. S. App. A59.

Acting on the union's March 6 acceptance of petitioner's offer, the remaining strikers reported for work on March 9, unconditionally seeking reinstatement. That same day petitioner wrote to the union informing it that there could be no contract based on petitioner's final offer because the union had previously rejected that offer. By letters of March 12 and 16, the union stated its position that the parties had a contract and requested dues deductions for employees "as per contract" (Pet. S. App. A28). The union also presented grievances pursuant to the contract in March and again in May. Petitioner refused to acknowledge the existence of an agreement or to conform to its provisions (Pet. S. App. A61).

2. The Board, adopting the findings and conclusions of the administrative law judge, found that petitioner violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and

(1), by refusing to recognize and sign the contract and by refusing to abide by its grievance and dues checkoff provisions, notwithstanding the union's earlier rejection and counterproposals.³ The Board applied its rule enunciated in *Pepsi-Cola Bottling Co.*, 251 N.L.R.B. 187, 189 (1980), enforced, 659 F.2d 87 (8th Cir. 1981), holding that (Pet. S. App. A58-A59):

a complete package proposal made on behalf of either party through negotiations remains viable, and upon acceptance *in toto* must be executed as part of the statutory duty to bargain in good faith, unless expressly withdrawn prior to such acceptance, or defeased by an event upon which the offer was expressly made contingent at a time prior to acceptance.

The Board found that the parties' February 10 agreement on noneconomic issues and petitioner's February 17 offer on economic issues represented a complete, unconditional contract package, and that the union's acceptance conveyed to petitioner's representative, Garza, was effective prior to Long's purported attempt to withdraw the offer through the federal mediator (Pet. S. App. A57-A60).

The Board's order required petitioner to acknowledge and sign the contract and give it effect retroactive to March 6, 1981 (Pet. S. App. A68).

³The Board also found that petitioner violated Section 8(a)(5) and (1), 29 U.S.C. 158(a)(5) and (1), by discontinuing its past practice of giving employees annual Christmas gifts of turkeys without notifying and bargaining with the union. In addition, the Board found that petitioner violated Section 8(a)(3) and (1), 29 U.S.C. 158(a)(3) and (1), by failing to reinstate in a timely manner economic strikers upon their unconditional offer to return to work and by requiring strikers to sign a company-prepared request for reinstatement as a condition of reinstatement (Pet. S. App. A66). The court of appeals affirmed the Board with respect to the Christmas gifts and reinstatement request forms, but denied enforcement of that portion of the Board's order concerning failure to make timely reinstatement (Pet. App. A6-A7). None of these issues is before this Court.

3. The court of appeals enforced the Board's order concerning enforcement of the contract. The court noted that technical rules of contract formation do not restrict the collective bargaining process "because the parties are obliged by their relationship to deal exclusively with each other and because policies of the Act dictate that this process not be encumbered by undue formalities" (Pet. App. A4-A5). The Court expressly adopted the Eighth Circuit's holding in *Pepsi-Cola Bottling Co. v. NLRB*, *supra*, that a collective bargaining offer is not automatically terminated by rejection or counterproposal. Rather, it may be accepted within a reasonable time unless: (1) expressly withdrawn before acceptance; (2) expressly conditioned on a subsequent event; or (3) intervening circumstances would make the acceptance unfair (Pet. App. A5). The court found that substantial evidence supported the Board's conclusion that petitioner's final offer was not withdrawn or otherwise terminated (Pet. App. A5-A6).

ARGUMENT

Petitioner contends that the Board's failure to apply technical contract principles of offer and acceptance to the collective bargaining process conflicts with the policies underlying the Act and the decisions of other courts. There is no merit to this contention.

1. It is well-established that technical contract rules do not control whether an employer and union have in fact reached an agreement through collective bargaining. *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d at 89; *NLRB v. Donkin's Inn, Inc.*, 532 F.2d 138, 141-142 (9th Cir.), cert. denied, 429 U.S. 895 (1976); *NLRB v. Truckdrivers*, 532 F.2d 709, 571 (6th Cir.), cert. denied, 429 U.S. 859 (1976); *Lozano Enterprises v. NLRB*, 327 F.2d 814, 818 (9th Cir. 1964). As this Court has observed, "[a] collective bargaining

agreement is not an ordinary contract for the purchase of goods and services, nor is it governed by the same old common-law concepts which control such private contracts." *Transportation-Communication Employees Union v. Union Pacific R.R.*, 385 U.S. 157, 160-161 (1966).

In a commercial setting, the traditional rule that "rejection terminates an offer" allows the offering party to strike a bargain elsewhere with no danger of being bound to more than one contract. But in collective bargaining, unlike the private commercial context, parties are bound to deal exclusively with each other and to bargain in a good faith effort to reach agreement. Upon rejection of an offer, the offeror may not simply seek out another contracting party. "The choice is generally not between entering or refusing to enter into a relationship, for that in all probability preexists the negotiations." *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 580 (1960). Thus, the common law rule that a rejection or counteroffer necessarily terminates the offer has little relevance to collective bargaining, and runs counter to the federal labor policy encouraging collective bargaining agreements. In accord with these principles, the Board has ruled that an offer remains open for a reasonable time unless expressly withdrawn or made contingent on a condition subsequent, or unless intervening circumstances would make an acceptance unfair. *Pepsi-Cola Bottling Co.* 251 N.L.R.B. at 189; *Penasquitos Gardens, Inc.*, 236 N.L.R.B. 994, 995 (1978), enforced mem., 603 F.2d 225 (9th Cir. 1979).

There is no merit to petitioner's contention (Pet. 5-11) that the Board's approach conflicts with federal labor policy because it results in the imposition of substantive terms against the will of the parties. To the contrary, the essence of the Board's inquiry is whether the parties have actually reached an agreement, as opposed to whether the technical

requirements of contract law have been observed.⁴ *Penasquitos Gardens, Inc.*, 236 N.L.R.B. at 995; *NLRB v. Donkin's Inn, Inc.*, 532 F.2d at 141. Nothing in the Board's rule requires or allows the imposition of a contract to which a party has not assented. An employer is free to withdraw its offer at any time before acceptance, or expressly to condition its offer.⁵ Moreover, an employer cannot be held to an

⁴Petitioner's apparent contention that common law rules of offer and acceptance are *required* in collective bargaining is tautological. Petitioner offers nothing more than bare assertion to support its submission that the traditional rules must be adhered to in order to foster agreement between parties. There is nothing inherent in the traditional rules, as opposed to the Board's approach based on its experience with collective bargaining under the Act, that will insure successful bargaining. And, as we have demonstrated, the Board's rule is tailored to the particular legal relationships and requirements of the parties in the collective bargaining process.

⁵Petitioner argued before the Board and court of appeals that its final offer of February 17 was expressly contingent on a condition subsequent — *i.e.*, that the parties reach agreement before February 18 (Pet. S. App. A60; Pet. App. A5). Petitioner appears to revive that argument before this Court (Pet. 10).

The Board found that the February 18 deadline was a condition only of the parties' separate agreement to make wage rates retroactive to the date of the union's certification (Pet. S. App. A20-A21), not of the collective bargaining agreement as a whole. The Board stated that, "[i]n view of [the company's] bargaining stance, and its insistence upon the finality of its proposal, it is unrealistic to contend that the proposal contained any doubt, or contingencies, or conditions" (Pet. S. App. A60). As the court below concluded, this finding was supported by substantial evidence (Pet. App. A5-A6); it does not warrant review by this Court. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-491 (1951).

In any event, there is ample support for the Board's finding. Petitioner's sole support for its contention is an offhand remark by negotiator Long, in testimony before the administrative law judge, that, with respect to the February 17 negotiating session, "[e]ither we were going to get an agreement or all bets were off" (Transcript of Proceedings Before the Board at 679). Read in context, Long's testimony referred only to the separate agreement on retroactivity, not to the entire agreement

unexpired offer for more than a reasonable time or in circumstances where it would be unfair to do so.⁶ See, e.g., *Lane Construction Corp.*, 222 N.L.R.B. 1224 (1976). The Board's rule is thus designed to foster, not to hinder, the process of mutual agreement through collective bargaining.

2. The Board's approach has been approved by all courts of appeals that have considered it. *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d at 89; *Penasquitos Gardens, Inc. v. NLRB*, 603 F.2d at 225; see *Capitol-Husting Co. v. NLRB*, 671 F.2d 237, 244 (7th Cir. 1982). The cases relied on by petitioner (Pet. 8) are not to the contrary.

In *F.W. Means & Co. v. NLRB*, 377 F.2d 683, 686 (7th Cir. 1967), the court acknowledged that "technical rules of contracts" do not necessarily control all decisions in labor-management cases," and stated only that the normal rules of offer and acceptance *generally* obtain. Moreover, that case did not involve withdrawal of an accepted offer. Rather, the court there held that, in the circumstances of the case, the employer had not agreed to rescind an offer accepted by the Union merely because the employer had agreed to modify two of its terms, and therefore the union

(Transcript at 677-679). Moreover, the parties continued to negotiate after February 18; no mention was made at the February 26 session that petitioner's final offer was no longer effective. Further, there is evidence that petitioner thought that the offer remained open. When Long heard on March 6 that the union had sent a mailgram of acceptance, he tried expressly to withdraw the offer (Pet. S. App. A59; Pet. App. A5). Petitioner's final offer of February 17 thus remained open and was not terminated by the failure of the parties' separate agreement on retroactivity.

⁶The fact that a union may have lost a strike between rejection and acceptance, thereby enhancing the employer's bargaining strength, does not create such unfairness as to negate the acceptance where, as here, the acceptance came within a reasonable time and the employer had an opportunity to withdraw its pre-strike offer. Pet. App. A6; *Pepsi-Cola Bottling Co. v. NLRB*, 659 F.2d at 90.

was not free to seek a more favorable contract than the one to which it had agreed. In *Lozano Enterprises v. NLRB*, 327 F.2d 814, 818-819 (9th Cir. 1964), the court expressly refused to apply technical contract rules in determining whether the parties had arrived at a binding agreement. The court noted that "in general" the normal rules of offer and acceptance apply, but stated (327 F.2d at 818-819):

We do not think that, in deciding whether, under a particular set of circumstances, an employer and a union have in fact arrived at an agreement that the employer is then obliged to embody in a written contract upon the union's request, the Board is strictly bound by the technical rules of contract law.

Similarly, the court in *Teamsters Local 524 v. Billington*, 402 F.2d 510, 513 (9th Cir. 1968), held, in a suit for specific performance of an arbitration clause in a collective agreement, that an employer's refusal to sign an agreement does not prevent its enforcement. And *United Steelworkers v. Bell Foundry Co.*, 626 F.2d 139, 140 (9th Cir. 1980), held only that, in the particular circumstances involved, a union's request for clarification of an employer's proposal did not serve to modify the proposal so as to relieve the employer of its obligations under the proposal. *Bell Foundry Co.*, moreover, was a suit in federal court to compel arbitration, and while the court decided the case by reference to general contract principles, nothing in its opinion suggests that the Board is bound by such principles in determining whether the parties have reached agreement on a contract.⁷

⁷Petitioner cites prior decisions of the Board (Pet. 7) which it contends are in conflict with the Board's current position as expressed in *Pepsi-Cola Bottling Co.*, 251 N.L.R.B. at 189. Each of the cases is distinguishable on its facts. Thus, in *Worrell Newspapers, Inc.*, 232 N.L.R.B. 402, 407 (1977), the Board expressly rejected the contention

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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that general contract principles applied in circumstances similar to those here and distinguished all of the cases relied on by petitioner on their facts. *Id.* at 407 nn.15 & 18.